Supreme Court, U.S.
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No. 99-

In the Supreme Court of the United States

COMBUSTION ENGINEERING, INC., *Petitioner*

v.

LOIS A. MCGILL, SAMUEL CLARY MCGILL, KATHERINE MCGILL LAMAR, JENIDA S. MCGILL, INEZ M. MCWHORTER, KATHLEEN MCGILL BEGGS, CHERRY MCGILL ROWLAND, EUGENE H. MCGILL, JR., JAMES CURTIS MCGILL, ELIZABETH BEVEL MCGILL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a trespass/nuisance case alleging injury to property from the escape of acidic water from a mine reclamation site. The jury awarded $47,000 in compensatory damages and $45 million in punitive damages. After various post-verdict proceedings, including a remand by this Court for further consideration in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the district court concluded that "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe" and that the punitive damages were "grossly disproportionate" to the $10,000 fine imposed on petitioner by the expert agency for the very conduct at issue. Nonetheless, the district court approved a punitive to compensatory ratio of 100:1, and the court of appeals affirmed.

The question presented is whether a punitive award that is 100 times the compensatory damages is constitutionally permissible when the compensatory damages are more than nominal and the defendant's conduct is not reprehensible.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Combustion Engineering, Inc. (hereinafter "CE")[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 170 F.3d 1320. The order of the district court (App., *infra*, 31a-41a) is unreported.

JURISDICTION

The Eleventh Circuit issued its opinion affirming the district court's judgments on April 1, 1999. CE's timely filed petition for rehearing was denied on June 2, 1999 (App., *infra*, 42a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

In this case, the court of appeals sustained a punitive award of over $4,000,000 — 100 times the plaintiffs' compensatory damages — despite concluding that petitioner's conduct was not reprehensible and that the 100:1 ratio of punitive to compensatory damages and the 430:1 ratio of the punitive damages to the fine imposed on petitioner by the expert state agency were "gross enough to raise a suspicious judicial eyebrow." As this case exemplifies, the lower courts have manifested great confusion and reached widely divergent results in their understanding and application of the "reasonable relationship" guidepost. The result in this case is flatly inconsistent with rulings of other courts of appeals, and the court's strained reasons for reaching it — that the

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[1] CE is a wholly owned subsidiary of Asea Brown Boveri Inc.

actual damages were "relatively small" and that the state's interest in deterring environmental torts "is strong" — highlight the need for this Court to provide further guidance and make this case an ideal vehicle for the purpose. The relevant facts are as follows.

1. *Mining operations on Graves Mountain.* Graves Mountain is a unique geological formation (Tr. 205-206, 820) located in Lincoln County, Georgia. Beginning in the 1920s, Tiffany's mined the property for rutile, a substance used for polishing diamonds. App., *infra,* 1a; Tr. 610-611. At some point thereafter (not specified in the record), Aluminum Silicates, Inc. began mining the site for kyanite, a mineral used to make heat-resistant products. App., *infra,* 1a-2a; Tr. 265. Sometime in the mid-1960s, Combustion Chemicals, Inc. was formed to purchase the site and conduct kyanite mining operations. App., *infra,* 2a n.1; Tr. 265. Combustion Chemicals was at all times a wholly-owned subsidiary of CE. App., *infra,* 2a n.1; Tr. 266.

Combustion Chemicals conducted mining operations until 1984, when it sold the property to Pasco Mining Company. App., *infra,* 2a; Tr. 318, 936. Pasco operated the mine site until November 1, 1986, at which time the facility and all environmental responsibilities attendant to it reverted to Combustion Chemicals pursuant to the parties' 1984 contract. App., *infra,* 2a; Tr. 319, 936-937. Combustion Chemicals never resumed mining operations. App., *infra,* 2a; Tr. 937. In 1990, it was merged into CE. Tr. 266. Because there is no dispute that CE is responsible for Combustion Chemicals' liabilities, we shall hereinafter refer to both entities as CE.

2. *The acidic water problem.* As with many industrial processes, the mining of kyanite has environmental consequences. At the time mining began, Graves Mountain was, in essence, a "big solid rock." App., *infra,* 2a; Tr. 177. The kyanite was embedded within the rock. The mine operator would remove, crush, and process the rock in order to extract the kyanite. App., *infra,* 2a; Tr. 176, 566. The

operator would then deposit the remaining crushed rock, or "tailings," in containment areas, known as "tailings ponds." App., *infra,* 2a; Tr. 176, 566-567. One of the minerals remaining in the tailings was pyrite. When rainwater falls on pyrite that has been exposed to oxygen, a chemical reaction takes place that renders the water more acidic. App., *infra,* 2a; Tr. 177, 178, 682. Although most of the water on CE's property was collected and treated in a retention pond (Tr. 306, 370-371, 390, 565-573, 988-989), during heavy rains acidic water periodically seeped into small streams that originated on CE's property and flowed (or, often, merely trickled) through properties downstream (App., *infra,* 2a).

Although the runoff from the mine site affected the quality of the streams running through the neighboring properties (see Tr. 429, 431, 441, 446-447, 491-492, 498-499, 507-508, 509-511, 554-555, 581, 607-608, 649-650), the owners of those tracts rarely complained to CE during the close to 20 years that it conducted mining operations there. See Tr. 431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 607-608, 654. See also Tr. 803 (trial court's observations that "there were very few vocal and aggressive complaints, if any" and that "there does seem, in this evidence, to be a paucity of complaints up until the time that the lawsuits were conceived"). When owners of downstream properties did complain about escaping water, silt build-up, or other problems, CE responded decisively to address the complaints. Tr. 420, 436, 515-517, 520-521, 573, 1024. Indeed, when CE was aware of a problem, it moved to fix it even in the absence of complaints. See, *e.g.*, Tr. 376, 569-570.

3. *The reclamation of Graves Mountain.* When Pasco acquired the mine site from CE, it was required to submit to the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources a plan for reclaiming the site. That plan, which estimated the reclamation cost

at $169,200 (see Ct. Exh. 1, at 3),[2] was approved by EPD and was in effect at the time the property reverted from Pasco to CE (Tr. 940). Upon reacquiring the property, CE dismantled the mining facility pursuant to Pasco's reclamation plan. Tr. 358, 375, 383-384, 937-938, 940-941, 969. CE then set about determining what other steps needed to be taken in order "to control any type of rainfall that would come on to the mountain." Tr. 384. Accordingly, it "went about studying elevation and topo[graphic] maps to determine the drainage patterns." *Ibid.*

CE also entered into discussions with EPD for purposes of developing an amended reclamation plan "to reflect the conditions that [CE] found when [it] took the property back over." Tr. 941. See also Tr. 382. The EPD approved CE's reclamation plan in December 1988. Ct. Exh. 1, at 43; Tr.383, 947. In its approval letter, EPD indicated that it "appreciated [CE's] prompt submittal of a formulated work schedule and a time frame in which to accomplish Phases I, II, III, and IV." Ct. Exh. 1, at 43.

As the district court found, both in conjunction with its implementation of the four-phase reclamation plan and subsequently, CE has "actively attempted to prevent acidic water from entering the streams emanating from its property." App., *infra,* 34a. Notwithstanding CE's "active[]" efforts, acidic water periodically seeped into the streams emanating from CE's property. As a result, the EPD issued an administrative complaint against CE alleging that acidic water was escaping from one of the "tailings ponds" on the property and that there had been a discharge of acidic water from the retention pond. Tr. 984-985. CE immediately

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[2] Court Exhibit 1 is a composite of several different documents. Unfortunately, the pages are not numbered consecutively. Our page cites to all exhibits are derived by counting consecutively from the cover sheet of the exhibit.

entered into discussions with EPD, which ultimately resulted in a consent order dated September 6, 1991. Tr. 985-986.

Pursuant to the consent order, CE promptly submitted a plan for preventing acidic water from escaping from the property, which included installing a water diversion system, redesigning the water treatment system, and reclaiming the west side of the retention pond. Ct. Exh. 1, at 44-60; Tr. 951, 986-987. After receiving EPD approval on March 3, 1992 (see D. Exh. 55), CE set about implementing the plan. Tr. 303, 315, 333-334, 951-952, 974-975, 1006, 1210; Ct. Exh. 1, at 46-57.

CE's efforts slowed the seeps considerably but did not stop them entirely. Tr. 952, 1005, 1209-1210, 1215-1216. See also Tr. 305-306. Accordingly, CE developed a plan to install a piping system that would take the water from the tailings ponds to the retention pond. Tr. 313, 952-953, 1210. That plan was submitted to EPD in November 1992 and was approved in April 1993. Tr. 953; Ct. Exh. 1, at 72. Work began a week later and was in progress at the time of trial, with a scheduled completion date of July 1993. Tr. 953, 1205-1206.

From the time it began dismantling the mining plant through June 1991, CE spent approximately $700,000 in reclaiming the property. Tr. 389, 949-950. Between that time and April 1993, CE spent an additional $633,000 on measures for preventing the escape of acidic water. Tr. 964. In addition, other measures were either in progress at the time of trial or were planned to commence after trial. See Tr. 309-311, 956-960, 1205-1206. The cost of the measures that were underway brought CE's total expenditures for reclamation of the site to approximately $1.6 million as of the time of trial (Tr. 1205) — *i.e.*, nearly ten times the amount estimated in the Pasco plan that had been approved by the EPD and inherited by CE.

4. *Proceedings below.* The plaintiffs in this case were 23 individuals who owned a total of 16 tracts downstream from the CE property. App., *infra,* 2a. Very few of these individuals lived on their property. App., *infra,* 2a n.2; see Tr. 399-400, 425-426, 497, 575, 641-643. Some did not use their property at all (App., *infra,* 2a n.2; Tr. 324, 328, 330), and several others had been to their property (or the streams on it) only rarely if at all in recent years (App., *infra,* 2a n.2; Tr. 328, 422, 460-461, 463-464, 466). The plaintiffs who used their property did so for raising cattle (see Tr. 400, 432, 497, 551, 595, 643), storing wrecked cars (Tr. 433), hunting (Tr. 440, 483, 582-583), timbering (Tr. 445, 453, 461-462, 464-465, 470, 472, 488, 551, 576, 592, 595, 601-602, 615-616, 643), and/or growing hay (Tr. 489-490, 504, 584-585, 643). App., *infra,* 2a n.2.

From November 1986 (the time CE retook possession of the site) through August 1991, not a single one of the 23 plaintiffs felt sufficiently aggrieved about the escape of acidic water from the site to complain to CE. See Tr. 424, 431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 607-608, 654, 964, 989. See also Tr. 803. Nonetheless, several of them filed suit against CE in August 1991, alleging nuisance and trespass. App., *infra,* 2a. Several others filed a similar suit in May 1992. *Ibid.* After the two suits were consolidated, the remaining plaintiffs were added by motion. *Ibid.*

The case was tried to a jury in a two-phase trial in which issues relating to punitive damages were tried separately from the issues of liability for the underlying torts and compensatory damages. Because Georgia has a four-year statute of limitations for trespass and nuisance, the parties were in agreement, and the jury was instructed, that the relevant time frame for damages purposes was the four-year period prior to the commencement of the plaintiffs' suits. App., *infra,* 3a; Tr. 17, 55, 211, 325, 1166-1167, 1171-1172, 1173, 1179.

At trial the plaintiffs did not claim that the condition of the streams caused any personal injury, diminution in property value, damage to crops or animals, or other economic loss. App., *infra,* 2a; see Tr. 329-330, 411-412, 428, 434-435, 443-445, 453, 461-462, 468, 471-472, 481, 488-490, 503-504, 553-554, 582-585, 594-596, 602, 608-609, 647, 652, 769. The only harms plaintiffs alleged were that the streams looked and smelled bad, that the streams no longer contained fish, and that cows would not drink from the streams. App., *infra,* 2a; see Tr. 403-404, 428-429, 435, 441, 452, 467, 478-480, 499, 501-502, 552, 554, 577, 644, 648-649.

Significantly, the plaintiffs generally acknowledged that these harms were the result of the mining operations that had ceased in 1986, not the reclamation activities during the four-year limitations period preceding the initiation of their lawsuits. Tr. 413-414, 429, 431, 441, 446-447, 491-492, 498-499, 507-508, 509-511, 554-555, 581, 607-608, 650. Indeed, several testified that conditions had improved since mining ceased. Tr. 435, 485-486, 504-505, 522-523, 562-563, 652. See also Tr. 1021-1022 (testimony of non-plaintiff neighbor). And, in fact, the documentary evidence reflected that the pH of the water on most of the plaintiffs' properties was well within state water quality standards. See P. Exh. 9, at 10, 25, 37, 42, 45; P. Exh. 12, at 3 (stations L-10 and L-11); P. Exh. 13, at 4 (samples 5 and 7); D. Exh. 45 (stations SW11, SW17, SW4, SW6, SW5, SW7, SW12, SW10, SW8, SW15, SW14).

In the first phase of the trial, the jury returned a total of 13 verdicts for compensatory damages in favor of the various plaintiffs in the combined amount of $47,000. App., *infra,* 3a. The 13 verdicts ranged from $1,000 to $10,000. *Ibid.* The jury also awarded the plaintiffs their litigation costs. *Ibid.* In the second phase of the trial, the jury imposed punitive damages in the astonishing amount of $45 million. *Ibid.*

After CE filed its post-trial motions, the trial court remitted the punitive damages to $15 million, which the plaintiffs accepted. The court then entered 13 separate judgments for the various individual plaintiffs and groups of plaintiffs. *Ibid.*

CE then appealed. During the pendency of the appeal, CE settled with three plaintiffs, leaving 10 judgments for an aggregate of $43,500 in compensatory damages and $12 million in punitive damages. *Ibid.* The Eleventh Circuit affirmed those judgments without opinion, whereupon CE petitioned for certiorari, contending, *inter alia,* that the punitive damages were unconstitutionally excessive. This Court granted CE's petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). The Eleventh Circuit in turn remanded to the trial court. App., *infra,* 4a.

After briefing and argument, the trial court issued an order concluding that the remitted punitive damages were unconstitutionally excessive. It began by noting that "[t]he relevant conduct in this case involves only the four years preceding the filing of Plaintiffs' Complaint in September of 1991," and that throughout this period the mine was no longer operating but instead CE had "put into effect a land reclamation plan, which had been approved by the Georgia Environmental Protection Division, designed to restore the property and control the acidic rainfall problem that had become evident." App., *infra,* 34a. The court found that "[p]ursuant to the plan, Combustion had actively attempted to prevent acidic water from entering the streams emanating from its property, but those attempts were not entirely successful." *Ibid.* Nevertheless, it concluded, "[a]t all times, Combustion cooperated with the Environmental Protection Division to deal with recurrent problems of acidic water discharge or seepage. Thus, during the relevant time period, it would appear that Combustion's most egregious

conduct was the failure to do more to prevent the acidic water problem." *Ibid.* The court continued:

> Combustion did not act with intentional malice or cause physical injury in failing to prevent acidic water drainage into the streams. The evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of any kind after it reacquired the property. It did not commit illegal acts, knowing or suspecting that the acts were illegal. In fact, Combustion responded to any criticisms or penalties levied against it by the Environmental Protection Division in a positive, more aggressive manner. Hence, there is no evidence that Combustion is a recidivist that continually repeats certain misconduct.

Id. at 35. In short, the district court concluded, "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe." *Id.* at 38a.

Turning to the ratio guidepost, the court found that "the aggregate ratio of 320:1 bears no reasonable relationship to the amount of harm or even potential harm suffered by Plaintiffs." *Id.* at 37a. Taking into account the fact that the EPD had fined CE only $10,000 for the very conduct at issue and that the highest fine EPD ever had imposed (for a far more serious environmental infraction) was $150,000, the court also concluded that the aggregate punishment "is grossly disproportionate to the [administrative] penalties that Combustion has suffered or has come to expect" (*id.* at 38a-39a & n.8).

Nonetheless, rather than either granting a new trial or cutting the punitive damages to a modest multiple of compensatory damages, the court held, without explanation as to how it reached such a conclusion, that "a multiplier of 100 to each Plaintiff's compensatory award is an appropriate assessment of the punitive damages award." *Id.* at 39a. The

court accordingly entered judgments resulting in an aggregate punishment of $4,350,000.

The Eleventh Circuit affirmed. After reciting the evidence relating to CE's conduct, it concluded that the district court's "finding that CE's conduct was not highly reprehensible is not clearly erroneous." App., *infra*, 22a. It also "agree[d] with the district court that the initial disparities in the relevant ratios [*i.e.*, punitive damages to compensatory damages and punitive damages to the applicable administrative fine] were genuinely shocking and that $15 million in punitive damages was grossly excessive." *Id.* at 25a. It further acknowledged that "[t]he reduction to $4.35 million also produced ratios which were gross enough to 'raise a suspicious judicial eyebrow.'" *Ibid.* (quoting *BMW*, 517 U.S. at 576). Nevertheless, the court concluded that a punitive award that is 100 times the compensatory damages and 435 times the fine imposed by the expert state agency for the conduct at issue was not unconstitutionally excessive because "[t]he actual damages awarded were relatively small; yet the state's interest in deterring the conduct — environmental pollution — is strong." *Id.* at 26a.[3]

REASONS FOR GRANTING THE PETITION

A. The Lower Courts Are Sorely In Need Of Further Guidance Regarding *BMW*'s Ratio Guidepost.

1. In *BMW*, the Court went a considerable way toward providing a framework for use by lower courts confronted with the task of reviewing punitive damages awards challenged as excessive. But as with other areas addressed by the Court in recent years (*e.g.*, the standards for admission of

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[3] During the pendency of the appeal, CE settled with eight of the plaintiffs. However, the settlements played no part in the Eleventh Circuit's analysis. See App., *infra*, 30 a n.39. After the Eleventh Circuit rendered its judgment, CE settled with one more plaintiff, leaving respondents as the sole remaining group of plaintiffs, with a judgment for $10,000 in compensatory damages and $1 million in punitive damages.

expert testimony), a single case is seldom sufficient to resolve the various important questions surrounding a complex issue. Instead, it is common that, as the lower courts begin applying the new decision, the need for additional guidance crystallizes. That is manifestly the case with respect to punitive damages.

The *BMW* Court identified the ratio of punitive to compensatory damages as an important guidepost for evaluating whether a punitive award is excessive. 517 U.S. at 580. The Court observed that the principle that punitive damages must bear a "reasonable relationship" to compensatory damages has "a long pedigree" (*ibid.*), although it quite sensibly declined to impose any strict mathematical formula for assessing reasonableness (*id.* at 582). The Court did, however, observe that double, treble, and quadruple damages remedies have been legislatively sanctioned for hundreds of years (*id.* at 580-581); it reiterated that, in *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991), it had found a 4:1 ratio to be "close to the line" (517 U.S. at 581); and it clarified that the relevant ratio in *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993), in which it upheld a $10 million exaction, was in a range that was "not more than 10:1" at its upper end (517 U.S. at 581).

But the Court did not indicate the extent to which these three groups of ratios (1:1 to 3:1; 4:1; and a range of up to 10:1) should guide the excessiveness inquiry. Moreover, it identified several circumstances in which a "higher ratio" of punitive to compensatory damages may be warranted (*id.* at 582), although not specifying when those exceptions come into play or the magnitude of the ratios that would be justified in such circumstances.

While many courts have understood *BMW* to make clear that, in the absence of very low compensatory damages, single-digit ratios are normally all that can be justified, others clearly do not view the "reasonable relationship" guidepost as

having significant force. And some lower courts have explicitly characterized *BMW*'s discussion of the ratio guidepost as "somewhat murky" and the process of determining whether a particular ratio is excessive to be "difficult." *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997). See also *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 936 (M.D.N.C. 1997) ("Although a significant amount might be necessary to deter a large corporation from engaging in an activity which, although illegal, results in only minor harm, it is unclear [after *BMW*] what weight can be afforded to such a consideration."); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (*BMW* "does not give lower courts much guidance on determining the excessiveness of punitive damage awards for 'more reprehensible' conduct" than that at issue in *BMW*); *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 868 (Tex. Ct. App. 1997) ("The United States Supreme Court has granted *certiorari* on issues relating to punitive damages and the inherent due process concerns, but it has given lower courts no bright-line guidance.") (internal quotations marks and citation omitted).

Some commenters too have found the ratio guidepost to be unclear. See, *e.g.*, Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards after* BMW v. Gore, 29 Conn. L. Rev. 1797, 1821-1822 (1997) ("*Gore* gives little guidance to future Courts in assessing when a punitive damages award is 'reasonably related' to the compensatory award"); John Z. Lagrow, Comment, BMW of North America, Inc. v. Gore: *Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENGLAND L. REV. 157, 198 (1997) (Supreme Court "has not established meaningful guidelines to help reviewing courts determine when an award is reasonable based on the ratio between compensatory and punitive damages"); Stephanie L. Nagel, Recent Development, BMW v. Gore: *The U.S. Supreme Court Overturns an Award of*

Punitive Damages as Violative of the Due Process Clause of the Constitution, 71 TULANE L. REV. 1025, 1039 (1997) ("The problem remains that the Supreme Court has not provided any guidance as to what is reasonable."); Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. REV. 1084, 1114 (1997) ("*BMW* fails to provide the guidance lower courts need.).

Of course, the Court identified all the considerations that were needed to establish the excessiveness of the *BMW* punishment. It is a fair inference that the Court understood the need for further fleshing out of the reasonable-relationship requirement but deemed it wise to allow that process to proceed in the first instance in the lower courts. Now that the "fleshing out" process has been underway for more than three years, it has become evident that there is marked disagreement among the lower courts regarding certain fundamental aspects of the reasonable-relationship requirement.

Most federal courts faced with actual damages between $10,000 and $50,000 have interpreted *BMW* to necessitate remittiturs to ratios in the range of 1:1 to 10:1. See, *e.g.*, *Hamilton, supra* (27:1 ratio reduced to 6:1 where compensatory damages were $44,000); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (140:1 ratio reduced to 10:1 where compensatory damages were $35,000); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (holding excessive a punitive award that was approximately 6.5 times the roughly $20,000 compensatory award and observing that a ratio of 4:1 is "close to the line"); *Ortiz-Del Valle v. National Basketball Ass'n,* 42 F. Supp. 2d 334 (S.D.N.Y. 1999) (ratio reduced from 72:1 to 2.6:1 where compensatory damages, as reduced, were approximately $97,000); *Mahoney v. Canada Dry Bottling Co.*, 1998 WL 231082 (E.D.N.Y. May 7, 1998) (19:1 ratio reduced to 3:1 where compensatory damages were $35,000); *Rivera v.*

Baccarat, Inc., 10 F. Supp. 2d 318 (S.D.N.Y. 1998) (19:1 ratio reduced to 2:1 where compensatory damages were $20,000); *Lawyer v. 84 Lumber Co.*, 991 F. Supp. 973 (N.D. Ill. 1997) (reducing 5:1 ratio to 3:1 where compensatory damages were $50,000); *Kim v. Dial Serv. Int'l, Inc.*, 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997) (reducing 30:1 ratio to 1:1 where compensatory damages were $25,000), aff'd, 1998 WL 514297 (2d Cir. 1998), cert. denied, 119 S. Ct. 1030 (1999); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996) (10:1 ratio reduced to 2:1 where compensatory damages were $25,000); *Florez, supra* (13:1 ratio reduced to 5:1 where compensatory damages were $55,000); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1 where compensatory damages were approximately $45,000). Cf. *Groom v. Safeway, Inc.*, 973 F. Supp. 987 (W.D. Wash. 1997) (150:1 ratio reduced to 10:1 where compensatory damages were $5,000).

Several state courts have reached similar results. See, *e.g.*, *Alfa Mut. Fire Ins. Co. v. Thomas*, 1999 WL 219636 (Ala. Apr. 16, 1999) (32.5:1 ratio reduced to 4:1 where compensatory damages were $10,000); *Chrysler Corp. v. Schiffer*, 1999 WL 97991 (Ala. Feb. 26, 1999) (6.5:1 ratio reduced to 3:1 where compensatory damages were $50,000); *Patel v. Patel*, 708 So. 2d 159 (Ala. 1998) (affirming reduction of 5:1 ratio to 2.5:1 where compensatory damages were $86,000); *Servino v. Medical Ctr. of Delaware, Inc.*, 1997 WL 528263 (Del. Super. Ct. Aug. 1, 1997) (reducing 10:1 ratio to 2:1 where compensatory damages were $50,000); *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex. Ct. App. 1997) (aggregate ratio of 138:1 reduced to 4:1 where aggregate compensatory damages were $10,835). See also *American Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997) (reducing 8:1 ratio to 3:1 where compensatory damages were $250,000); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997) (13.5:1 ratio

reduced to approximately 3:1 where compensatory damages were roughly $350,000).

In addition, some courts have ordered remittiturs to ratios lower than 1:1 when they have concluded that the conduct was not reprehensible. See, *e.g.*, *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 1999 WL 430185 (3d Cir. June 28, 1999) (reducing $50 million punitive award to $1 million where compensatory damages were $48 million); *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164 (E.D. Pa. 1996) (reducing $150,000 punitive award to $17,500 where plaintiff's damages were $165,250).

On the other hand, a number of federal courts, including the court below, have allowed strikingly disproportionate ratios even when compensatory damages have not been nominal. See, *e.g.*, *Guzman v. Tower Dev., Inc.*, 1997 WL 801449 (9th Cir. Dec. 19, 1997) (affirming 17:1 ratio where compensatory damages were roughly $230,000); *Jordan v. Shaw Indus., Inc.*, 1997 WL 734029 (4th Cir. Nov. 26, 1997) (affirming ratios of 101:1 where compensatory damages were $12,000 and 488:1 where compensatory damages were $2,500); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 1999 WL 200668 (E.D. Pa. Apr. 8, 1999) (holding that ratio of approximately 17:1 was not unconstitutionally excessive where compensatory damages were $105,000); *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1277 (D. Kan. 1998) (finding that a 20:1 ratio did not violate due process where compensatory damages were $56,000); *Deters v. Equifax Credit Info. Servs.*, 981 F. Supp. 1381 (D. Kan. 1997) (permitting 49:1 ratio where compensatory damages were $5,000).

Many state courts have likewise brushed the ratio requirement aside. See *Daka, Inc. v. Breiner*, 711 A.2d 86 (D.C. 1998) (upholding 39:1 ratio where compensatory damages were $10,000); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996) (upholding 26:1 ratio where compensatory damages were $120,000); *Wilson v. IBP, Inc.*,

558 N.W.2d 132 (Iowa) (approving 500:1 ratio where compensatory damages were $4,000), cert. denied, 118 S. Ct. 52 (1997); *Ford Motor Co. v. Ammerman,* 705 N.E.2d 539 (Ind. Ct. App. 1999) (upholding 18:1 ratio where compensatory damages were $400,000); *Michigan Mut. Ins. Co. v. Sports, Inc.,* 698 N.E.2d 834 (Ind. Ct. App. 1998) (upholding 14:1 ratio where compensatory damages were $72,000); *Albert H. Wohlers & Co. v. Bartgis,* 969 P.2d 949 (Nev. 1998) (approving punitive award of over 13½ times $275,000 compensatory award), cert. denied, 119 S. Ct. 2399 (1999); *Williams v. Aetna Fin. Co.,* 700 N.E.2d 859 (Ohio 1998) (upholding 100:1 ratio where compensatory damages were $15,000), cert. denied, 119 S. Ct. 1357 (1999); *Wightman v. Consolidated Rail Corp.,* 1997 WL 614962 (Ohio Ct. App. 1997) (affirming 15:1 ratio where compensatory damages were $1,000,000); *Parrott v. Carr Chevrolet, Inc.,* 965 P.2d 440 (Or. Ct. App. 1998) (rejecting trial court's reduction of 87:1 ratio to roughly 4.5:1 and instead imposing 28:1 ratio where compensatory damages were approximately $11,500); *Blume v. Fred Meyer, Inc.,* 963 P.2d 700 (Or. Ct. App. 1998) (affirming 18:1 ratio where punitive damages were $25,000); *Stranahan v. Fred Meyer, Inc.,* 958 P.2d 854 (Or. Ct. App. 1998) (reversing trial court's reduction of 16:1 ratio to 3:1 where compensatory damages were $25,000); *Elder v. Gaffney Ledger, Inc.,* 511 S.E.2d 383 (S.C. Ct. App. 1999) (upholding 30:1 ratio where compensatory damages were $10,000); *Schaffer v. Edward D. Jones & Co.,* 552 N.W.2d 801 (S.D. 1996) (upholding 30:1 ratio where compensatory damages were $25,000); *Vandevender v. Sheetz, Inc.,* 490 S.E.2d 678 (W. Va. 1997) (upholding 15:1 ratio where compensatory damages were $20,000), cert. denied, 118 S. Ct. 883 (1998); *Gianoli v. Pfleiderer,* 563 N.W.2d 562 (Wis. Ct. App. 1997) (upholding 17:1 ratio where compensatory damages were $12,000).

While some variance is to be expected, the dramatic differences from court to court in the ratios that have been deemed permissible reflect not simply that no one ratio is appropriate for all cases, but rather that there is significant confusion among the courts as to the role of the ratio guidepost. As the enormous ratios permitted in this case and a few of the others cited above suggest, there is a pressing need for this Court to provide further guidance as to the application of the ratio guidepost.

2. In addition to adding to the ever-growing confusion regarding the application of the *BMW* guideposts (and the ratio guidepost in particular), the Eleventh Circuit's conclusion that a ratio of 100:1 is permissible when the degree of reprehensibility is low and the compensatory damages are $47,000 is in square conflict with *FDIC v. Hamilton, supra*. In *Hamilton,* the Tenth Circuit interpreted the ratio discussion in *BMW* to mean that "in 'economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio'" and that "even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases." 122 F.3d at 861 (quoting *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639 (10th Cir. 1996)).[4] The Tenth Circuit further reasoned that, "[t]o determine the proper ratio in a given case," courts "must consider what the Supreme Court called '[p]erhaps the most important indicium of the reasonableness of a punitive damages award'" — namely, "'the degree of reprehensibility

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[4] The Tenth Circuit is not alone in this reading of *BMW*. See, *e.g., Groom,* 973 F. Supp. at 995 ("The Supreme Court has suggested that a ratio of 10-to-1 might be close to the limit."); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 682 N.Y.S.2d 167, 169 (App. Div. 1998) (citing *BMW* as "suggesting 10 to 1 as an outside ratio"). We note parenthetically that *TXO* did not in fact uphold a straight 10:1 ratio: rather, the actual ratio in that case could not be precisely determined but ***ranged*** from as little as 1.2:1 to at most 10:1 (see 509 U.S. at 462), or an average of about 5:1.

of the defendant's conduct.'" *Ibid.* (quoting *BMW*, 517 U.S. at 575).

Applying this approach, the Tenth Circuit found in *Hamilton* that the $1.2 million punitive award, which was approximately 27 times the $44,000 compensatory award, was grossly excessive. The court began by noting that the case before it involved "some of the relevant reprehensibility factors," including that the defendant bank "was found to have committed fraud, a tort recognized by every state" and that the bank knew that the plaintiffs "were in a financially vulnerable position when the [fraudulent] statements were made." 122 F.3d at 861-862. Nevertheless, because the tort was economic and arose out of a contract between the parties, the court concluded that "the reprehensibility factor here militates against punitive damages that represent a substantial multiple of compensatory damages." *Id.* at 862.

The Tenth Circuit observed that the compensatory damages were small compared to the defendant's wealth and recognized that "a higher ratio of punitive to actual damages is warranted here than would be the case if the base level of compensatory damages were a significantly higher figure relative to the size of the defendant." *Ibid.* Nevertheless, and most important for present purposes, this consideration did ***not*** cause the Tenth Circuit to cast away all restraint and uphold the 27:1 ratio before it. Instead, the court simply concluded that it was justifiable to permit a ratio somewhat in excess of the 4:1 ratio that was considered "close to the line" in *Haslip*. It thus held that "the 'maximum constitutionally permissible'" ratio under the circumstances was 6:1 and ordered a remittitur to $264,000. *Ibid.* (quoting *Continental Trend*, 101 F.3d at 643).

The present case is irreconcilable with *Hamilton*. Here, the district court carefully reviewed the record and concluded, in a finding upheld by the court of appeals, that "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe." App., *infra*, 38a. Thus, there

is no basis for concluding that the conduct in the present case is any more reprehensible than the intentionally fraudulent conduct involved in *Hamilton*. In addition, the compensatory damages — $47,000 — are almost identical to the damages in *Hamilton*. Yet the Eleventh Circuit endorsed a ratio of 100:1, while the Tenth Circuit found a 27:1 ratio to be excessive and a 6:1 ratio to be the maximum constitutionally permissible.

It is thus clear that this case would have come out quite differently had it arisen in the Tenth Circuit (or the Eighth or Fifth Circuits for that matter (see page 13, *supra*)). Review is warranted to bring consistency to the application of the ratio guidepost.

B. The Rationales Offered By The Eleventh Circuit Are In Tension With *BMW* And Conflict With Decisions Of Other Federal And State Courts.

The decision below is a particularly appropriate one for further refining the ratio guidepost because each of the three rationales invoked by the Eleventh Circuit is either in tension with *BMW* or, at minimum, implicates an aspect of *BMW* as to which there is ambiguity. In addition, those rationales cannot be squared with the result and reasoning of numerous other courts of appeals and state supreme courts.

1. The Eleventh Circuit's first rationale was that the actual damages were "relatively small." App., *infra*, 26a. Although purporting to be rooted in *BMW*, this justification in fact is in severe tension with it.

The *BMW* Court stated that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." 517 U.S. at 582. Here, the district court expressly found that "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe" (App., *infra*, 38a), and the Eleventh Circuit accepted that

finding on appeal. Accordingly, to the extent the exception for small awards was intended to be limited to cases involving "particularly egregious" misconduct, the present case is plainly outside the exception.

But even if the exception is not so limited (and we certainly are prepared to accept that severe egregiousness is not necessary to justify a 100:1 ratio when compensatory damages are, say, below $100), the Eleventh Circuit's characterization of the $47,000 aggregate compensatory award as "small" is untenable in this context. After all, the compensatory damages in *BMW* itself were only $4,000 — yet the Court gave no indication that it believed a substantially higher than ordinary ratio to be warranted in that case.[5]

In any event, the Eleventh Circuit's rationale that low compensatory damages warrant higher ratios, while sound enough as a purely abstract proposition, hardly supports the gigantic ratio allowed here. Rather, it is a matter of common sense that the maximum allowable punitive award when the compensatory damages are "small" and the conduct is not reprehensible should not exceed the punitive damages (or, to be more precise, the total judgment) allowed when compensatory damages are larger.[6] Yet the 100:1 ratio

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[5] We suggest that the Court more likely had in mind cases of nominal or very low damages. *See, e.g., Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729 (7th Cir. 1998) (upholding $2,500 punitive award where compensatory damages were $1); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (reducing $200,000 punitive award to $75,000 where compensatory damages were $1); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256 (Ga. Ct. App. 1996) (upholding punitive awards of $45,000 and $20,000 where compensatory damages were $1); *Jacque v. Steenburg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (upholding $100,000 punitive award where compensatory damages were $1).

[6] For precisely this reason, the Eleventh Circuit's reliance on *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996) (cited at App., *infra*, 26a) was badly misplaced. In *Cooper*, two prisoners who had been beaten up by prison guards and then denied medical treatment received compensatory damages

endorsed by the panel sustains a punishment level ($4.35 million) that substantially ***exceeds*** the punishments allowed by other federal courts when compensatory damages have been higher and the conduct (as described by those courts) has been significantly more egregious. *See, e.g., Watkins v. Lundell,* 169 F.3d 540 (8th Cir. 1999) (reducing $3.5 million punitive award to $940,000, where compensatory damages were $235,000), petition for cert. filed, 68 U.S.L.W. 3080 (May 19, 1999) (No. 99-107); *Denesha v. Farmers Ins. Exch.,* 161 F.3d 491 (8th Cir. 1998) (reducing $4 million punitive award to $700,000 where compensatory damages were approximately $165,000), cert. denied, 119 S. Ct. 1763 (1999); *EEOC v. HBE Corp.,* 135 F.3d 543 (8th Cir. 1998) ($4.3 million aggregate punitive award reduced to $480,000 where compensatory damages were $112,000); *Kim v. Nash Finch Co.,* 123 F.3d 1046 (8th Cir. 1997) ($7 million punitive award reduced to $300,000 where compensatory damages were $100,000).[7]

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of $5,000 each and punitive awards of 12 times that amount — a mere $60,000 each. Nothing in the Seventh Circuit's opinion would support a conclusion that a compensatory award of $47,000 (almost five times the amount involved in *Cooper*) is small or that a ratio of 100:1 is ever justified when compensatory damages are well into five figures. Cf. *Fall v. Indiana Univ. Bd. of Trustees,* 33 F. Supp. 2d 729, 745-746 (N.D. Ind. 1998) (holding that none of the *BMW* exceptions applied where compensatory damages were $5,157 and there was no basis for concluding that "jury had any difficulty in assessing or compensating the Plaintiffs' subjective injuries; ratio reduced from 155:1 to less than 10:1); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.,* 955 F. Supp. 1032, 1043 (S.D. Ind. 1997) (refusing to accept high ratio and distinguishing *Cooper* on grounds that conduct in case at bar was not egregious and that $60,000 total punitive award and 12:1 ratio in *Cooper* were minuscule in comparison to punitive damages and ratio in case at bar), aff'd in part and rev'd in part on other grounds, 142 F.3d 367 (7th Cir. 1998); *Schimizzi,* 928 F. Supp. at 786 ($19,000 award of economic damages was "not small" for purposes of *BMW* exception).

[7] See also *Ace v. Aetna Life Ins. Co.,* 40 F. Supp. 2d 1125 (D. Alaska 1999) ($16.5 million punitive award reduced to $950,000 where compensatory damages were $127,000); *Utah Foam Prods. Co. v. Upjohn Co.,* 930 F. Supp.

The recent decision of the Third Circuit in *Inter Medical Supplies* is an especially striking instance. There, although the defendant's fraud caused $48 ***million*** of harm to the plaintiffs, the court of appeals remitted the punitive damages to only $1 million (1999 WL 430185, at *21-*23), ***less than one-fourth*** of the punitive damages upheld by the Eleventh Circuit in this case with $47 ***thousand*** of actual damages.

Because cases are commonplace in which juries return large punitive verdicts despite the fact that actual damages are modest, review would be highly beneficial to provide further guidance as to the scope of the exception for small compensatory awards.

2. The Eleventh Circuit's second rationale for allowing a 100:1 ratio was that Georgia has a "strong" interest in deterring environmental pollution. App., *infra*, 26a. This rationale effectively nullifies all three *BMW* guideposts. If a multimillion dollar punishment can be justified simply by invoking the state's general interest in deterring a particular category of torts, there would be no need to inquire into the degree of reprehensibility of the conduct, the extent of the harm caused, or the punishments imposed by the expert state agency for the very conduct at issue or like conduct. To use the Eleventh Circuit's own example, a defendant who pours a can of soda into a stream could be treated as harshly as one who deliberately disposes of dioxin by dumping it into the drinking water system.

In fact, under the Eleventh Circuit's reasoning, *BMW* should have been decided the other way, since there is no

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513 (D. Utah 1996) ($5.5 million punitive award reduced to approximately $600,000 where compensatory damages were approximately $315,000), aff'd, 154 F.3d 1212 (10th Cir. 1998), cert. denied, 119 S. Ct. 1358 (1999); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194 (E.D. Pa. 1996) ($3 million punitive award reduced to $300,000 where compensatory damages were approximately $300,000), rev'd on other grounds, 113 F.3d 476 (3d Cir. 1997).

intellectually tenable basis for treating Alabama's general interest in deterring consumer fraud as any less weighty than Georgia's general interest in deterring environmental torts — especially ones of such modest proportions as that involved here. Review is thus warranted to clarify that the three *BMW* guideposts may not be nullified by reference to a generalized interest in deterrence.

3. The Eleventh Circuit also indicated that the 100:1 ratio it endorsed could be justified by CE's financial condition. See App., *infra,* 26a-27a. This rationale also creates tension with *BMW.*

In *BMW,* this Court did ***not*** include financial condition as a guidepost even though the respondent had urged it to uphold the $2 million punishment in that case on the ground that it was small in relation to the petitioner's net worth (see Brief of Respondent at 39 & n.49, *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996)). Moreover, as the present case well demonstrates, the use of financial condition as an aggravating factor is at odds with the three guideposts that the Court did identify.

With regard to the reprehensibility guidepost, there is a logical disconnect between varying punishment with the defendant's wealth and the well-established, constitutionally based principle that punishment should fit the wrong. As to the ratio guidepost, it makes no sense to deem a particular ratio unreasonable for one defendant (*e.g.,* BMW) but reasonable for another (*e.g.,* General Motors) simply because the latter is larger. Finally, consideration of net worth is inconsistent with the comparative fines guidepost because neither the fines considered in *BMW* nor most other criminal fines or administrative penalties vary with the wealth of the defendant. See *Kemezy v. Peters,* 79 F.3d 33, 36 (7th Cir. 1996) ("[t]he usual practice with respect to fines is not to proportion the fine to the defendant's wealth"). If a 1,000:1 ratio of punitive damages to the applicable administrative fine

was disproportionate for BMW, it would be equally disproportionate for General Motors.

Because this Court did not expressly address financial condition in *BMW*, however, the lower courts are in disarray on the subject. See generally *Florez*, 939 F. Supp. at 1348-1349 ("after *BMW* it is unclear what role the financial status of the defendant plays in determining the excessiveness of punitive damage awards").

Several courts have recognized that when, as here, the other *BMW* factors do not support a large punitive award, such an award may not be justified simply because the defendant is wealthy. See, *e.g.*, *Continental Trend*, 101 F.3d at 641 (although the defendant's "wealth must remain relevant," "[f]rom the Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits"); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) ("where a defendant has not committed an act that would warrant a large punitive damages award, such an award should not be upheld upon judicial review merely because the defendant has the ability to pay it"); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) ("merely because a defendant may be able to pay a very large award of punitive damages, without jeopardizing the defendant's financial position, does not justify an award which is disproportionate to the heinousness of the defendant's conduct").[8] The Eleventh Circuit's

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[8] See also, *e.g.*, *Groom*, 973 F. Supp. at 995 (defendant's wealth could not justify $750,000 punitive award when none of the *BMW* factors supported an award of that amount); *Leab v. Cincinnati Ins. Co.*, 1997 WL 360903, at *16 (E.D. Pa. June 26, 1997) ("Contrary to Leab's assertions, the wealth of a defendant is not, by itself, sufficient justification for the imposition of a large punitive damages award."); *Creative Demos*, 955 F. Supp. at 1044 ("The Supreme Court has consistently stated that the fact that a defendant is a large corporation with deep pockets cannot serve to justify an otherwise excessive punitive damages award."); *Florez*, 939 F. Supp. at 1345 (the Supreme

rationale for affirming the 100:1 ratio in this case — despite the lack of reprehensibility of CE's conduct — cannot be reconciled with these cases, nor with cases such as the Tenth Circuit's decision in *Hamilton*, which contemplates an enhancement in ratio, but only of modest proportions, to reflect a wealthy defendant's financial condition. See page 18, *supra*.

On the other hand, like the Eleventh Circuit, several courts have continued to adhere to the view that wealth is a significant factor in the excessiveness analysis and have approved multimillion dollar awards primarily, if not exclusively, on the basis of this factor. See, *e.g.*, *Daka*, 711 A.2d at 100-101, 102; *Wilson*, 558 N.W.2d at 148; *Schaffer*, 552 N.W.2d at 813; *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 331 (Tenn. 1996); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 53 (Tex. 1998).

In short, the Eleventh Circuit's reliance on CE's financial condition adds to an already deep division among the courts regarding the role of wealth after *BMW*. Because it is clear that the 100:1 ratio in this case could not be justified on any other basis, this case is an ideal vehicle for resolving this significant, recurring issue.

Court's decision in *BMW* "appears to disfavor consideration of the defendant's financial worth and condition in deciding on what level of punitive damages to award"); *id.* at 1349 (observing that "the *BMW* Court did not list a defendant's financial condition as one of the 'guideposts'" and stating that "it is clear that [the defendant's] wealth cannot save a punishment that is deemed to be excessive under the *BMW* approach"); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (observing that in *BMW* "the Supreme Court did not treat the defendant's wealth as relevant"); *Utah Foam*, 930 F. Supp. at 531 ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award."). Cf. *Ace*, 40 F. Supp. 2d at 1135 ("due process and comity concerns counsel restraint where a proposed award of punitive damages is based to a significant degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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AUGUST 1999

APPENDIX A

Cheryl Maloof JOHANSEN, Mildred D. Goldman, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

Aubrey G. McGill, William E. Jones, Raymond H. Jones,
Martha Jones Long, et
al., Plaintiffs,

v.

COMBUSTION ENGINEERING, INC., Defendant-Appellant,
Cross-Appellee.

No. 97-8726.

United States Court of Appeals,

Eleventh Circuit.

April 1, 1999.

Affirmed in part, vacated in part, and remanded.

Appeals from the United States District Court for the Southern District of Georgia.

Before ANDERSON and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

HILL, Senior Circuit Judge:

Property owners brought a nuisance and trespass action against the present owner of a former mining site, Combustion Engineering, Inc. ("CE"), alleging that acidic water had escaped from the site, damaging streams that run through their properties. The jury awarded the owners an aggregate of $47,000 in compensatory damages and $45 million in punitive damages which the district court reduced to $4.35 million. All parties have appealed.

I.

In the 1920's, a company named Tiffany's mined a site in Lincoln County, Georgia for rutile, a substance used for polishing diamonds. At some point thereafter, Aluminum Silicates, Inc.

began mining the site for kyanite, a mineral used to make heat-resistant products. In the mid-1960's, CE purchased the site and began mining kyanite.[1] It conducted these mining operations until 1984, when it sold the property to Pasco Mining Company ("Pasco"). Pasco operated the mine site until November 1, 1986, at which time Pasco defaulted on its obligations and the facility and all environmental responsibilities for the property reverted to CE pursuant to the parties' 1984 contract. CE never resumed mining operations.

At the time the mining originally began, Graves Mountain was essentially a big, solid rock. The mine operator would remove, crush, and process the rock in order to extract the kyanite. After the removal of the kyanite, the remaining crushed rock, or "tailings," would be deposited into containment areas, known as "tailings ponds." One of the minerals in the tailings was pyrite. When rainwater falls on pyrite that has been exposed to oxygen, a chemical reaction takes place that renders the water more acidic. Periodically, acidic water from the mining site seeped into streams that flowed through CE's property affecting their quality as they ran through the properties downstream.

In August of 1991, several individuals who owned a total of sixteen tracts downstream from the mine site sued CE claiming damages for trespass and nuisance. Several other property owners filed suit in May of 1992, and the two suits were consolidated. Property owners' claim was that the streams looked and smelled bad, that the streams no longer contained fish, and that cows would not drink from the streams. They did not allege any personal injuries, risk to human health, diminution in property value, damage to crops or animals, or any other economic loss.[2]

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[1] Actually, a company named Combustion Chemical, Inc. was formed to purchase the site and do the mining, but this company was at all times a wholly-owned subsidiary of CE.

[2] Few of these individuals live on their property. Some do not use their property at all, and several others have been to their property (or the streams on it) only rarely if at all over the past several years. The plaintiffs who do use their property, do so for raising cattle, storing junked cars, hunting, timbering, or growing hay.

The case was tried to a jury in a two-phase trial in which issues relating to punitive damages were decided separately from liability for the underlying torts and compensatory damages. The jury was instructed that the relevant time frame for damages purposes was the four-year period prior to the commencement of the property owners' suit.[3]

In the first phase of the trial, the jury returned a total of thirteen verdicts for compensatory damages in favor of the various property owners in an aggregate amount of $47,000. The thirteen verdicts ranged from $1000 to $10,000. The jury also awarded property owners litigation costs in the amount of $227,000.

In the punitive damages phase of the trial, property owners were required as a matter of Georgia law to prove by clear and convincing evidence that CE's actions "showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5(b). To recover more than $250,000 each, property owners were required to demonstrate, again by clear and convincing evidence, that CE acted "with the specific intent to cause harm." *Id.* at § 51-12-5.1(f). The jury awarded $3 million in punitive damages to each of the fifteen property owners who owned the sixteen parcels of land at issue, for a total of $45 million.

The district court found this amount "shocking," which if allowed to stand would "give[ ] the system a black eye." The court entered an order granting CE's motion for a new trial unless property owners agreed to remit all punitive damages over $15 million. Property owners agreed to do so and the court entered separate judgments totaling $15 million in punitive damages.

CE appealed to this court. During the pendency of the appeal, CE settled with three property owners, leaving an aggregate of $43,500 in compensatory damages and $12 million in punitive damages at issue in the appeal. After oral argument, we affirmed

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[3] Georgia has a four-year statute of limitations for trespass and nuisance.

those judgments without opinion. *Johansen v. Combustion Engineering, Inc.*, 67 F.3d 314 (11th Cir.1995).

CE petitioned the Supreme Court for certiorari, contending that the punitive damage award was still excessive. The Supreme Court deferred ruling on CE's petition pending its resolution of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). After it ruled that the Constitution does not permit "excessive" punitive damage awards, the Court granted CE's petition, vacated this court's judgment, and remanded the case to us for further consideration in light of *BMW*.

We remanded the case to the district court. The district court reexamined the punitive award under *BMW*, and concluded that the Constitution would permit punitive damages in an amount no more than 100 times each plaintiff's compensatory award. Therefore, he ordered the entry of judgment for each of the remaining plaintiffs in an amount equal to the jury's compensatory award plus 100 times that amount as punitive damages. This resulted in an aggregate punitive damage award of $4.35 million. The district court did not afford property owners the opportunity to elect a new trial.

CE appealed, arguing that even $4.35 million in punitive damages is unconstitutionally excessive on the facts of this case. CE also contends that the district court erred in not offsetting the punitive damage award by the amounts it had already paid some of the property owners in settlement.

Property owners cross-appealed arguing that the district court erred in holding that the $15 million punitive damages award was unconstitutionally excessive. They seek restitution of the district court's remittitur of $15 million which they accepted in lieu of a new trial. They also argue that the district court erred in ordering post-judgment interest to run from the date of the second rather than the first judgment.

Finally, property owners claim that the district court committed constitutional error when it reduced the jury's punitive damage verdicts to $4.35 million and unilaterally entered judgments totaling that amount. Although they do not analyze it as such, this

claim raises a jurisdictional issue of first impression which we must resolve prior to proceeding to the merits of this appeal.[4]

II.

A federal court has no general authority to reduce the amount of a jury's verdict. *Kennon v. Gilmer*, 131 U.S. 22, 29, 9 S.Ct. 696, 33 L.Ed. 110 (1889). The Seventh Amendment prohibits re-examination of a jury's determination of the facts, which includes its assessment of the extent of plaintiff's injury. *Id.* A federal court may not, therefore, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, ... enter an absolute judgment for any other sum than that assessed by the jury." *Id.* at 30, 9 S.Ct. 696.[5] To do so would deprive the parties of their constitutional right to a jury. *Id.*

A district court may, however, order a new trial.[6] The authority to do this is located in the common-law principle, later codified in the Judiciary Act of 1789, that "[t]rials by jury in civil causes could not subsist now without a power, somewhere, to grant

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[4] A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises. *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *Blue Cross & Blue Shield v. Sanders*, 138 F.3d 1347, 1351 (11th Cir.1998). "We always must investigate questions of subject matter jurisdiction, whether or not they are raised by the parties to the case." *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir.1992) (quoting *Fitzgerald v. Seaboard System R.R.*, 760 F.2d 1249, 1251 (11th Cir.1985)). *See also* Rule 12(h)(3), Fed.R.Civ.P., ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[5] The Seventh Amendment applies only to the federal courts. *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172 (5th Cir.1979).

[6] A court may also order a new trial limited to the issue of damages. *Kemp v. Balboa*, 23 F.3d 211 (8th Cir.1994); *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1552 (10th Cir.1991).

new trial.... It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial." *Bright v. Eynon*, 1 Burr. 390, 393 (K.B. 1757) (Lord Mansfield) (quoted by *Judge John J. Parker in Aetna Cas. & Sur. Company v. Yeatts*, 122 F.2d 350, 353-54 (4th Cir.1941)).[7] Therefore, when a court finds that a jury's award of damages is excessive, it may grant the defendant a new trial.[8] *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

A federal court's power to "order" a remittitur grew out of this authority to grant a new trial. A court which believes the jury's verdict is excessive may order a new trial unless the plaintiff agrees to remit a portion of the jury's award. *Dimick v. Schiedt*, 293 U.S. 474, 486-87, 55 S.Ct. 296, 79 L.Ed. 603 (1935). This practice dates from Justice Story's opinion in *Blunt v. Little*, 3 F.Cas. 760, 761-62 (No. 1578) (C.C.D.Mass.1822) (Story, J.), in which he announced that, because the verdict was not supported by the evidence, unless the plaintiff was willing to remit $500 of his damages, the cause would be submitted to another jury. Although Justice Story cited no authority whatever, the Supreme Court has "never expressed doubt with respect to this rule." *Dimick*, 293 U.S. at 486, 55 S.Ct. 296. *See e.g., Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854 (1889); *Northern Pac. R. Co. v. Herbert*, 116 U.S. 642, 646-47, 6 S.Ct. 590, 29 L.Ed. 755 (1886).

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[7] The court's power to order a new trial is recognized in Rule 59(a), Fed.R.Civ.P.:

> A court may grant a new trial for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

[8] This is merely a special application of the general power of the trial court to set aside a verdict that is against the weight of the evidence. *Greyhound Corp. v. Dewey*, 240 F.2d 899 (5th Cir.1957).

The Seventh Amendment requires, however, that the plaintiff be given the option of a new trial in lieu of remitting a portion of the jury's award. *Hetzel v. Prince William County, Va.*, 523 U.S. 208, 118 S.Ct. 1210, 1211, 140 L.Ed.2d 336 (1998). In *Hetzel*, the Supreme Court reversed the Fourth Circuit's mandamus to the district court to enter judgment for a remittitur without affording the plaintiff the option of electing a new trial. The Court expressly held that no judgment for a remittitur may be entered without the plaintiff's consent because the Seventh Amendment prohibits the court from substituting its judgment for that of the jury's regarding any issue of fact. *Id.* at 1212. See also *Dimick*, 293 U.S. at 474, 55 S.Ct. 296; *Gasperini*, 518 U.S. at 433, 116 S.Ct. 2211. If the plaintiff does not consent to the remittitur, the court has no alternative but to order a new trial. *Id.*

In this case, however, that did not happen. This reduction was neither consented to nor rejected in favor of a new trial. Rather, the district court entered reduced judgments totaling $4.35 million in punitive damages, without seeking property owners' consent nor affording them the option of electing a new trial.

Although they now claim the district court abridged their Seventh Amendment right to a jury, property owners did not bring this "error" to the district court's attention. Instead, they filed a notice of appeal of the reduced judgments. In their initial briefs, each claims the right to elect a new trial, should they so desire, after we decide this appeal.[9] This possibility caused us to reflect on the procedural posture of this case.

Prior to *BMW*, if a district court ordered a remittitur, a plaintiff had two choices. He could invoke his Seventh Amendment right to reject the district court's reexamination of the jury's verdict (the remittitur) and elect a new trial, or he could consent to the remittitur. *Neither of these two choices, however, was appealable.*

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[9] Both parties assume that property owners had a constitutional right to elect a new trial after the second "remittitur." Defendants concede this point, however, only if property owners must make that election prior to our resolution of this appeal.

A district court's grant of a new trial is not appealable.[10] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). Such an order is merely interlocutory and is not appealable under the final judgment statute invoked by property owners as the basis for this appeal. *Id. See also* 28 U.S.C. § 1291. Therefore, if property owners had been afforded the opportunity to reject the reduced awards and had elected a new trial, the district court would have granted CE's motion for a new trial and this order would not have been appealable.[11] *Seltzner v. RDK Corp.*, 756 F.2d 51 (7th Cir.1985); *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 810 F.Supp. 1520, 1523.(W.D.Okla.1992).

Neither could property owners have appealed if they had accepted the reductions.[12] *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977). Although for some years there was authority, especially in the Fifth Circuit, that a plaintiff who consents to a remittitur "under protest" may challenge on appeal of the final judgment the correctness of the remittitur order, *United States v. 1160.96 Acres of Land*, 432 F.2d 910 (5th Cir.1970), in *Donovan*, the Supreme Court made clear that a plaintiff who has accepted a remitted award may not appeal that award. 429 U.S. at 649, 97 S.Ct. 835.

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[10] The only exception would be where the district court was without the power to grant the motion, as, for example, where the motion was untimely. *See Phillips v. Negley*, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886).

[11] It is *reviewable*, however, on appeal of the final judgment entered after the second trial. If the appellate court agrees, it will reinstate the verdict reached at the first trial. *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir.1980).

[12] If property owners had consented to the reduced awards, the district court would have denied the motion for a new trial. Defendants may not appeal this denial. *State Nat. Bank of El Paso v. United States*, 488 F.2d 890, 893 (5th Cir.1974). It merges into the final judgment, however, which, of course, is appealable. Thus, the denial of a motion for new trial is reviewable on appeal of the final judgment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Lloyd v. Gill*, 406 F.2d 585 (5th Cir.1969).

In sum, we have for review an "order of remittitur" which has neither been consented to nor rejected by property owners. In fact, if either of these two events had occurred, this case would not now be before us as there would be no appealable order.[13] It appears that property owners hoped to avoid a new trial and proceed to immediate appellate review of the reduction in punitive damages by failing to object to the district court's entry of judgment.

Jurisdiction in this court, however, may not be conferred by a party's silence. *Fitzgerald v. Seaboard System R.R.*, 760 F.2d 1249, 1251 (11th Cir.1985) ("Therefore, lack of jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation...."). If the Seventh Amendment continues to prohibit a federal court from "enter[ing] an absolute judgment for any other sum than that assessed by the jury," *Kennon*, 131 U.S. at 30, 9 S.Ct. 696, then the entry of judgment without property owners' consent was error and this case is due to be dismissed for lack of jurisdiction. Alternatively, if the reexamination clause is not implicated by the district court's entry of judgment in this case, the court was entitled to enter the judgment and we have jurisdiction over this appeal. Since the district court entered judgment under the authority of BMW, the resolution of this issue must lie in the interplay between BMW and the Seventh Amendment.

III.

At common law, no review of jury verdicts was permitted except upon writs of error, which were limited to questions of law. *Gasperini*, 518 U.S. at 452, 116 S.Ct. 2211 (citing 3 W. Blackstone, Commentaries on the Laws of England 405 (1768)). The Seventh Amendment incorporated this principle, forbidding any reexamination of a jury's determination of the facts. *Gasperini*, 518 U.S. at 452, 116 S.Ct. 2211. Neither common law nor the Seventh Amendment, however, prohibits reexamination of the verdict for

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[13] Defendants, of course, could appeal the remitted amount as still excessive, but only after plaintiffs had *consented* to the remittitur and it became an *appealable* final judgment.

legal error.[14] *Id.* Therefore, if legal error is detected, the federal courts have the obligation and the power to correct the error by vacating or reversing the jury's verdict. *Id.*

Similarly, where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount. *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591, 13 S.Ct. 444, 454, 37 L.Ed. 292 (1893). In *Estill*, the Supreme Court determined that interest had been improperly awarded by the jury. The Court affirmed the jury's verdict as to the damages, but wrote that "it is not affirmed as to the amount of interest, or any part thereof, awarded by the verdict or judgment. That judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for the [damages]...." *Id.* The Seventh Amendment is not offended by this reduction because the issue is one of law and not fact.

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the Supreme Court held that the due process clause prohibits a state from imposing a "grossly excessive" punishment on a tortfeasor. Three years later, in *BMW*, the Court reversed a punitive damage award because it was unconstitutionally excessive. 517 U.S. at 562, 116 S.Ct. 1589. The Court held that the Constitution provides an upper limit on punitive damage awards so that a person has "fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 574, 116 S.Ct. 1589.

No one would dispute that the court, not the jury, has the responsibility for determining this constitutional limit. Courts decide questions of law, not juries. The real issue, therefore, is whether the court may enter judgment for a constitutionally reduced award without plaintiff's consent. So put, the question answers itself. Plaintiff's consent is irrelevant if the Constitution requires the reduction.

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[14] The Judiciary Act of 1789, 1 Stat. 73, also provides for "reexamin [ation]" of civil judgments upon a writ of error.

A constitutionally reduced verdict, therefore, is really not a remittitur at all.[15] A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion, *Gasperini*, 518 U.S. at 435, 116 S.Ct. 2211, a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause. *BMW*, 517 U.S. at 585, 116 S.Ct. 1589.

We conclude that, upon determination of the constitutional limit on a particular award, the district court may enter a judgment for that amount as a matter of law. Just as the Supreme Court struck the unlawful interest from the jury's verdict in *Estill* and ordered judgment entered for the remainder, so may the district court strike the unconstitutional excess from a jury's punitive damage award and enter judgment for that amount. As in *Estill*, the power to do so is located in the court's authority to enter judgment as a matter of law. Thus, a court proceeds under Rule 50, not Rule 59, in the entry of judgment for a constitutionally reduced award and the Seventh Amendment is not implicated in this legal exercise.[16]

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[15] We find support for this view in the Supreme Court's failure to use the term remittitur in *BMW* to characterize a constitutionally required reduction in a verdict. Nowhere does the Court characterize such a reduction as a remittitur. On the other hand, the Court did specifically refer to the Fourth Circuit's reduction of the jury's verdict in *Hetzel* as a remittitur. While we do not imply that the characterization of a reduction is controlling as to the Seventh Amendment issue, we conclude that the nature of the reduction by the court does.

[16] The court may enter judgment only if it reduces the jury's verdict to the maximum permitted by the Constitution in that particular case, as any smaller amount would invade the province of the jury. *See Dimick*, 293 U.S. at 486, 55 S.Ct. 296 ("Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict

We do not think *Hetzel* is to the contrary. In *Hetzel*, the Supreme Court reversed the Fourth Circuit's writ of mandamus directing the district court to enter judgment for a *remittitur* without affording the plaintiff the option of a new trial. 118 S.Ct. at 1211. It is clear that the Supreme Court viewed the reduction of the verdict in *Hetzel* as a traditional remittitur: "In determining that the evidence did not support the jury's general damages award and in ordering the District Court to recalculate the damages, the Court of Appeals in this case imposed a remittitur." 118 S.Ct. at 1211. There was no claim in the case that the Constitution required the reduction. Therefore, the reduction must have been an exercise of the court's discretion. As we have seen, the exercise of a court's discretion, under the authority of Rule 59, to propose a remittitur must afford the plaintiff the option to elect a new trial.[17]

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along with the unlawful excess—in the sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence.").

[17] On remand of *Hetzel*, the Fourth Circuit explained that it had believed that after *Gasperini* and *BMW* "a substantial constitutional question had emerged as to whether the Court's decision in *Kennon* could be understood as controlling the disposition of the Seventh Amendment issue." *In re Bd. of County Sup'rs of Prince William County, Va.*, 143 F.3d 835, 840 (4th Cir.1998). The court read *BMW* to mean that the Seventh Amendment right to a jury would not be offended by the entry of judgment for a reduced verdict required by law—by any law, including state law. *Id.*

We agree with the Fourth Circuit that this issue is clouded by the statement in *Gasperini* that appellate review of a remittitur is permitted because a jury's verdict has an "upper limit [under state law], and whether that limit has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." 518 U.S. at 435, 116 S.Ct. 2211 (quoting *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir.1961)). This language implies that even a traditional remittitur is a matter of law, not discretion. Whether state law remittiturs might ultimately be treated similarly to the constitutionally reduced verdict in our case, as the Fourth Circuit suggests, is a question that will, no doubt, be resolved as time goes by. We do not address it because we have concluded that it is not raised by the constitutional reduction in our case.

We have concluded, however, that a constitutionally reduced award is not a traditional remittitur at all. It is not discretionary, and the court's authority to do so does not lie in Rule 59. Therefore, a constitutional reduction is not controlled by *Hetzel*.

It appears that the Tenth and the Second Circuits may not agree. *Continental Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir.1996); *Lee v. Edwards*, 101 F.3d 805, 813 (2d Cir.1996). These courts have recently decided to continue to offer the plaintiff, whose verdict has been found to be constitutionally excessive,[18] a choice between a reduced verdict and a new trial to "avoid any conflict with the Seventh Amendment." *See OXY USA, Inc.*, 101 F.3d at 643. Some district courts, applying *BMW* have also permitted the plaintiff to elect a new trial. *See Mahoney v. Canada Dry Bottling Co.*, No. 94-CV-2924(FB), 1998 WL 231082 (E.D.N.Y. May 7, 1998); *Leab v. Cincinnati Ins. Co.*, No. Civ. A. 95-5690, 1997 WL 360903 (E.D.Pa. June 26, 1997); *Kim v. Dial Service Intern., Inc.*, No. 96 Civ. 3327(DLC), 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997).

While the Constitution does not prohibit this cautious approach, neither does it require that we tread in the Tenth Circuit's footsteps.[19] When we hold a jury's verdict to be unconstitutionally excessive, we do not reexamine any facts; we merely adjust the verdict to the maximum the Constitution allows

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[18] It is not totally clear that the Second Circuit held the jury's verdict unconstitutionally excessive in *Lee*. *See Punitive Damages—Constitutional Excessiveness*, 12 No. 3 Fed. Litigator 84 (March 1997). If not, then the Second Circuit followed *Hetzel* in affording the plaintiff the opportunity to elect a new trial instead of consenting to a remittitur.

[19] Giving a plaintiff the option of a new trial rather than accepting the constitutional maximum for this case would be of no value. If, on a new trial, the plaintiff was awarded punitive damages *less* than the constitutional maximum, he would have lost. If the plaintiff obtained *more* than the constitutional maximum, the award could not be sustained. Thus, a new trial provides only a "heads the defendant wins; tails the plaintiff loses" option.

in that case.[20] No new trial need be offered as the Supreme Court itself recognized in *BMW* when it remanded the case to the Alabama Supreme Court to determine "[w]hether the appropriate remedy requires a new trial or *merely an independent determination by the Alabama Supreme Court* of the award necessary to vindicate the economic interests of Alabama consumers...." 517 U.S. at 586, 116 S.Ct. 1589.[21]

In this case, the district court held that the $15 million punitive damage award was unconstitutionally excessive and entered judgments totaling $4.35 million. In effect, the court held the greater amount illegal and amended the jury's verdicts to conform to the law. We conclude, therefore, that the reexamination clause did not prohibit the district court from entering judgments for the amount of punitive damages it found to be constitutionally permitted without affording property owners an opportunity to elect a new trial. Accordingly, we hold that the district court correctly entered judgments in this case and that these judgments are properly before us for review.

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[20] Of course, if the district court exercises its discretion to reduce the verdict lower than the constitutional maximum for that case, the verdict has been "reexamined" and the plaintiff must be afforded the option to elect a new trial.

[21] It is unclear to us whether *BMW* allows an appellate court to determine the "upper limit" the constitution permits, or requires remand to the district court where the record is not so "cold." In the case of a remittitur under state law, a good argument can be made that *Gasperini* requires remand so that the district court can initially determine the appropriate award. 518 U.S. at 438, 116 S.Ct. 2211 ("Within the federal system, practical reasons combine with *Seventh Amendment constraints* to lodge in the district court, not the court of appeals, primary responsibility for application of [state law] check[s] on punitive damages")(emphasis added).

Such considerations are also present in the case of a constitutionally reviewed verdict. Indeed, the Supreme Court remanded both the *Gasperini* (excessive under state law) and the *BMW* (excessive under Constitution) verdicts to the lower courts for their redetermination of the damages. *Gasperini*, 518 U.S. at 439, 116 S.Ct. 2211; *BMW*, 517 U.S. at 586, 116 S.Ct. 1589.

IV.

Next, we consider whether the district court correctly determined the punitive damages permitted by the Constitution in this case.[22] Unless its award is at this constitutional "upper limit," it must be vacated.[23]

1. *The Constitutional Analysis*

In *BMW*, the Supreme Court held that punitive damages may be so excessive as to be unconstitutional. The Court outlined a two-step process for determining when this has occurred. The first step is to marshal the facts which will inform our ultimate judgment regarding the constitutionality of the punitive damage award. Then, based upon these constitutionally relevant facts, we draw a legal conclusion as to whether the punitive damages awarded in the case are excessive.

The first step, then, is to identify the constitutionally relevant facts. The Supreme Court has instructed that punitive damages must be based upon conduct in a single state—the state where the tortious conduct occurred—and reflect a legitimate state interest in punishing and deterring that conduct. The Constitution also requires that the defendant had fair notice that its conduct could result in punitive damages and in the severity of the potential

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[22] We are mindful of the difficulty of our task. *See* Justice Scalia's complaint that "[t]he Court has constructed a framework that does not genuinely constrain, that does not inform state legislature and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'" *BMW*, 517 U.S. at 606, 116 S.Ct. 1589 (Scalia, J. dissenting). Nevertheless, *BMW* requires that we search for this "constitutional upper limit" when we review a due process challenge to a punitive damage award.

[23] Depending on the outcome of our inquiry, we would instruct the district court that on remand it must further reduce the award to the constitutional maximum for that case, or, if the present amount is below the constitutional limit, consider it a traditional remittitur and offer the plaintiff the option to elect a new trial.

damages. *BMW* establishes three "guideposts" for determining whether the defendant had fair notice:

1) the degree of reprehensibility of the defendant's conduct;

2) the ratio of punitive damages to the actual harm inflicted on plaintiffs; and

3) the comparison between punitive damages and potential civil or criminal penalties for defendant's conduct.

Id. at 575, 116 S.Ct. 1589.

The district court in this case found that the conduct punished did occur in a single state and that this state—Georgia—has expressed a strong interest in deterring environmental pollution[24] and in protecting the rights of property owners "to have water flow upon [their] land in its natural state free from adulteration." *Kingsley Mill Corp. v. Edmonds*, 208 Ga. 374, 67 S.E.2d 111, 112 (1951). The court further found that:

1) "it is absolutely clear ... that the degree of reprehensibility [of CE's conduct] is not very severe;"

2) the ratio of the punitive ($15 million) to the actual damages ($47,000) was 320:1; and

3) the ratio of the $15 million award to the administrative penalty imposed upon CE ($10,000) was 1500:1.

The district court concluded that an award of $15 million was "grossly disproportionate" to both the actual damages and the administrative penalty. Since CE's conduct was "not very severe," the district court held that CE had no notice that such a disproportional amount might be awarded and, therefore, the punitive damage award was unconstitutionally excessive. The court

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[24] This interest is evidenced by Georgia's statutory scheme which provides that pollution of a stream is a trespass, O.C.G.A. § 51-9-7, and for civil penalties. O.C.G.A. § 12-5-52 (providing fines of up to $100,00 per day for violators of the Georgia Water Quality Control Act, O.C.G.A. §§ 12-5-20—12-5-53).

reduced the punitive damages awarded to $4.35 million, the maximum it believed the Constitution permits in this case.[25]

The parties disagree on the proper standard of review of this judgment under *BMW*. Property owners argue that *BMW* requires a completely *de novo* review with absolutely no deference to any of the district court's findings. CE correctly points out that a district court order granting or denying a remittitur under state law is reviewed for abuse of discretion, but acknowledges that "neither this Circuit nor any other federal court of appeals has articulated the standard for reviewing a punitive award under *BMW*." The appropriate standard of review, therefore, is another issue of first impression for our consideration.

2. *The Standard of Review*

Although the Seventh Amendment limits appellate review of state-law remittiturs to an abuse of discretion standard, *Gasperini*, 518 U.S. at 435, 116 S.Ct. 2211,[26] *BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture. The abuse of discretion standard is inapplicable where no discretion may be exercised.[27]

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[25] The district court found that, under *BMW*, $4.35 million was the "appropriate assessment" of the punitive damages. We interpret this language to mean the constitutional maximum. Otherwise, the district court would have invaded the province of the jury by passing judgment not on the constitutionality of the award, but on its reasonableness.

[26] *Gasperini* was the first instance in which the Supreme Court approved the appellate review of a district court's denial of a motion to set aside the verdict as excessive. 518 U.S. at 434, 116 S.Ct. 2211. (As we have seen, the grant of such a motion results in a non-appealable order.) The Supreme Court held that the Seventh Amendment limits the review to an abuse of discretion standard.

[27] As noted above, however, if the district court exercises its discretion to reduce a jury's verdict below the constitutional maximum, the plaintiff has a Seventh Amendment right to elect a new trial, and appellate review of that remittitur (after the second trial) must be for an abuse of discretion.

The ultimate question whether a punitive damage award is constitutionally excessive is, of course, a legal issue. We review questions of law de novo. Therefore, whenever an award of punitive damages is asserted to have entered that "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment," *BMW*, 517 U.S. at 568, 116 S.Ct. 1589, we review the award *de novo* under federal constitutional standards.[28]

In performing this review, however, we shall accept the district court's findings of fact unless they are clearly erroneous. Rule 52(a), Fed.R.Civ.P. *Cf. United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 2037 n. 10, 141 L.Ed.2d 314 (1998) ("The factual findings made by the district courts in conducting the excessive[ ] [fines] inquiry, of course, must be accepted unless clearly erroneous."). For example, the ratio of the actual to the punitive damages is an historical fact. We accept that finding unless it is clearly erroneous.

As to the comparison between the punitive award and other civil or criminal sanctions that could have been awarded, the selection of the most appropriate point of comparison—actual fine imposed, the maximum possible penalty or penalties in similar cases—is an issue of law. We, therefore, review the district court's determination of the appropriate comparison *de novo*. However, the district court's finding regarding this comparison, i.e., the disparity between the amount of the punitive damages award and the amount of the other civil or criminal sanctions, is an historical fact which we review for clear error.

Finally, the district court's determination of the reprehensibility of the CE's conduct is also ultimately factual. Although this determination must begin with the identification of the state's interest and an assessment of the strength of that interest—both legal questions requiring an interpretation of state law—the application of this legal standard to the facts of a

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[28] On the contrary, if no constitutional challenge is mounted, then we review the district court's determination of whether an award is "within the confines set by state law" for an abuse of discretion. *Gasperini*, 518 U.S. at 435, 116 S.Ct. 2211.

particular case results in a finding of fact which we review for clear error.[29]

Although the "proper characterization of a question as one of fact or law is sometimes slippery," *see Thompson v. Keohane*, 516 U.S. 99, 110-11, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), the degree of reprehensibility of the defendant's conduct is essentially a judgment about facts. Such judgments are properly the role of the district court and we will not second guess the judge who sat through the trial, heard the testimony, observed the witnesses and had the "unique opportunity to consider the evidence in the living courtroom context" while we have only the "cold paper record." *See Gasperini*, 518 U.S. at 437, 116 S.Ct. 2211. When findings of fact are based on determinations about witnesses' credibility, the deference accorded the trial judge is even more significant "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

This does not mean that we are without the power to reverse such judgments. If a district court's finding regarding the defendant's degree of reprehensibility is not supported by the record or is contrary to the evidence, it is "clearly erroneous." *See Anderson*, 470 U.S. at 573, 105 S.Ct. 1504. *BMW* instructs that there are several indicia of reprehensibility: deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive, and repetition of tortious conduct. 517 U.S. at 576, 116 S.Ct. 1589. Thus, where a district court finds deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive, and repetition of

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[29] Similarly, a finding of negligence or gross negligence, each of which involves the application of a specific legal standard to a particular set of facts, has traditionally been deemed to be a finding of fact reviewed for clear error. *See Hale Container Line, Inc. v. Houston Sea Packing*, 137 F.3d 1455, 1471 (11th Cir.1998). *See also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is [clearly erroneous].").

tortious conduct, but concludes, nonetheless, that the defendant's conduct was "not very reprehensible," a reviewing court would have ample authority to "set aside" this finding. Fed.R.Civ.P. 52(a). *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."). [30]

Review of a punitive damage award for constitutional error, therefore, requires first that we identify the state's interest in deterring the relevant conduct and the strength of that interest. Next, we review the district court's findings regarding the three BMW guideposts. To the extent that these are findings of fact, we review them for clear error. Finally, we determine *de novo* whether the punitive damage award is constitutionally excessive when measured by these guideposts.

In performing the latter assessment, the essential legal issue is whether the relevant facts of this case, as indicated by the various BMW factors, constitutionally support the punitive damage award, i.e., do these facts indicate that CE had adequate notice that its conduct might subject it to this punitive damage award. We will measure the adequacy of this notice by the degree of reprehensibility of CE's conduct, and the disparities between the actual damage it caused and the other available sanctions and the punitive damages that were ultimately awarded. In determining whether these disparities are constitutionally excessive, we will be informed by the strength of the state's interest in deterring CE's conduct.

V.

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[30] On the other hand, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574, 105 S.Ct. 1504 (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 94 L.Ed. 150 (1949)).

First, we find no error in the district court's findings that the conduct punished here occurred in a single state and that the Georgia statutes express a strong interest in deterring environmental pollution. This interest would support a substantial punitive award. To determine the maximum punitive award permitted by the Constitution in this case, we turn now to the district court's findings on the notice CE had regarding its potential liability.

1. ***Reprehensibility of CE's Conduct***

The most important indicum of the reasonableness of a punitive damages award may be the degree of reprehensibility of the defendant's conduct. *BMW*, 517 U.S. at 575, 116 S.Ct. 1589. The relevant conduct of CE in this case involves only the four years preceding the filing of the property owners' complaint in August of 1992.[31] The evidence was that, during that time, the mining site was not operated by CE. CE reacquired the property in 1986 from Pasco, but never resumed mining operations.[32]

During the four years at issue, the district court found that CE put into effect a land reclamation plan, which was approved by the Georgia Environmental Protection Division, and which was designed to restore the property and prevent the problem of acidic rain water entering the streams flowing through its property. CE also cooperated with the Environmental Protection Division. Although its efforts were not entirely successful, the district court concluded that CE's "most egregious conduct was the failure to do more to prevent the acidic water problem."

The district court concluded that the degree of CE's reprehensibility was not great. Given the "developing" science of land reclamation which characterized the late 1980's, and CE's

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[31] Where a trespass or nuisance is continuing in nature, an action may be maintained for all damages accruing during the four-year period preceding the filing of an action. O.C.G.A. § 9-3-30; *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir.1994) (citation omitted).

[32] CE had mined the property prior to selling the property to Pasco which, in 1986, defaulted on its obligation to CE.

significant efforts in that regard, the district court held that there was not evidence in this case of "that high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580, 116 S.Ct. 1589.

Although, under Georgia law, the jury must have found "specific intent to cause harm" to award punitive damages of this amount, the district court found that there was no direct evidence of such intent. The court concluded that the jury must have determined that CE's conduct exhibited a want of care rising to the level of conscious or deliberate indifference to the consequences of its actions. Specific intent to cause harm may properly be inferred from deliberate indifference, but the court concluded that CE's "deliberate indifference" did not constitute severe "reprehensibility" under *BMW*.

Furthermore, the district court found that none of the "aggravating factors associated with particularly reprehensible conduct," *BMW*, 517 U.S. at 576, 116 S.Ct. 1589, was present in this case. The district court found that:

> The evidence does not suggest that [CE] affirmatively engaged in prohibited conduct of any kind after it reacquired the property. It did not commit illegal acts, knowing or suspecting that the acts were illegal. In fact, [CE] responded to any criticisms or penalties levied against it by the Environmental Protection Division in a positive, more aggressive manner. Hence, there is no evidence that [CE] is a recidivist that continually repeats certain misconduct.

As there was ample evidence to support the district court's view of the evidence, we hold that its finding that CE's conduct was not highly reprehensible is not clearly erroneous.

2. *Ratio of Actual to Punitive Damages*

Punitive damages must bear a "reasonable relationship" to actual damages. *BMW*, 517 U.S. at 580, 116 S.Ct. 1589 (collecting cases). If the ratio of actual to punitive damages is too great, it is an indication that the defendant did not have adequate notice that its conduct might subject it to an award of this size. *Id.* at 574, 116 S.Ct. 1589 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair

notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.").

In this case, property owners were awarded an aggregate of $47,000 in actual damages. The aggregate $15 million punitive award, therefore, was almost 320 times the amount of actual damage. The district court concluded such a ratio was constitutionally excessive because it approached the 500:1 ratio found "breathtaking" by the Court in *BMW*. 517 U.S. at 583, 116 S.Ct. 1589. The district court's reduction to an aggregate of $4.35 million represents a ratio of 100:1.

3. ***Civil or Criminal Sanctions for the Misconduct***

There may also be a lack of adequate notice if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great. *BMW*, 517 U.S. at 584, 116 S.Ct. 1589. In this case, Georgia law provides for civil fines of up to $100,000 per day for pollution of its streams. O.C.G.A. §§ 12-5-20—12-5-53. The statute is administered by the Georgia Environmental Protection Division. The only fine it actually imposed on CE for the conduct at issue in this case was $10,000.

The district court selected the $10,000 actual fine imposed as the most relevant "other sanction" for comparison with the punitive damage award as required by *BMW's* third guidepost. We agree.

Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damage award depends in large part upon the available civil and criminal penalties the state provides for such conduct. In *BMW*, the Court clearly stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." 517 U.S. at 583, 116 S.Ct. 1589 (citations omitted).

If a statute provides for a range of penalties depending on the severity of the violation, however, it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by

the statute.[33] On the contrary, the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct. For example, if the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice he could be fined $100,000. Similarly, constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether this defendant had reason to believe that his specific conduct could result in a particular damage award.

The district court found that the degree of reprehensibility of CE's conduct was not severe. Furthermore, Georgia fined CE's conduct an amount far below the maximum permitted under its statute. The record reveals no indication that the $10,000 fine did not represent the strength of Georgia's interest in CE's conduct. Under these circumstances, the most relevant comparison under the third *BMW* guidepost is between the actual fine imposed and the punitive damage award. Where the state has actually imposed a penalty for the conduct at issue, the district court may choose to look to that penalty as an indication of the "legislative judgment" as to the "appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583, 116 S.Ct. 1589.[34]

The remitted punitive award of $15 million was 1500 times the amount of the $10,000 Georgia fine. The district court concluded that $15 million was "grossly disproportionate to the penalties that [CE] has suffered or has come to expect" and "would not comport with the fair notice requirements of the Constitution." The court's

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[33] For example, the Court held in *BMW* that none of the statutes covering the relevant conduct in that case would have provided "fair notice [to *BMW*] that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to multimillion dollar penalty." 517 U.S. at 584, 116 S.Ct. 1589.

[34] This is not to say that there may not be a case where the record reveals that the actual civil penalty imposed does not adequately reflect the state's interest in the specific conduct at issue in the case. In such a case, the court will have to decide whether to look at the maximum penalty permitted by state law or past penalties for similar conduct.

reduction of the punitive damages to $4.35 million represents an award 400 times greater than the actual civil sanction.

In sum, the district court found CE's conduct not very reprehensible, with no aggravating factors present. It found the $15 million punitive damage award to be 1500 times the administrative sanction imposed and 320 times the actual damages found by the jury. The district court reduced the $15 million to an aggregate of $4.35 million, thereby reducing the relevant ratios to 400:1 and 100:1. We consider now whether the district court erred in holding that $4.35 million is the maximum amount of punitive damages the Constitution permits in this case.

VI.

A punitive damage award may not be "grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576, 116 S.Ct. 1589. We agree with the district court that the initial disparities in the relevant ratios were genuinely "shocking," and that $15 million in punitive damages was grossly excessive.

The reduction to $4.35 million also produced ratios which were gross enough to "raise a suspicious judicial eyebrow." *Id.* (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 482, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). There is, however, no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). In examining the ratio between the actual damages and the punitive award in a given case, a "general concern of reasonableness ... properly enter[s] into the constitutional calculus." *Id.*

The Supreme Court recognized in *BMW* that there would be times when a substantial disparity between actual damages and the punitive award would be expected and, therefore, not constitutionally excessive:

> Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the

> monetary value of noneconomic harm might have been difficult to determine.

517 U.S. at 582, 116 S.Ct. 1589.

This is such a case. The actual damages awarded were relatively small; yet the state's interest in deterring the conduct—environmental pollution—is strong. In order to achieve this goal, ratios higher than might otherwise be acceptable are justified. As Chief Judge Posner has noted:

> [a] mechanical ratio, such as two to one or three to one or four to one or even ten to one, would not make good sense. The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages.

Cooper v. Casey, 97 F.3d 914, 919 (7th Cir.1996).[35]

Furthermore, in promoting deterrence, the economic wealth of a tortfeasor may be considered. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n. 28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). A bigger award is needed to "attract the ... attention" of a large corporation. *OXY USA, Inc.*, 101 F.3d at 641. CE is a large and extremely wealthy international corporation. It is not unlikely that having to pay $4.35 million in punitive damages would not make the company newsletter.[36] It

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[35] Another reason for a somewhat higher than normal ratio in this case is that, under Georgia law, property owners were forced to waive their claim for loss of market value in order to preserve their right to injunctive relief.

[36] Such a ratio might not be a direct deterrence to stockholders; it may not attract the attention of the board of directors. But it is not the act or omission of stockholders or directors that pollutes. The decision-maker on the scene whose conduct subjects the company to $4.5 million in damages is acutely aware that this loss affects the year-end reports of the department or division within which he works. An award sufficient to attract the attention of the department head in charge of the local decision-maker can be instrumental in deterring local disregard of the rights of others. In that sense, vast international corporations are made up of many smaller enterprises and deterrence of the small may be sufficient.

should, however, attract the attention of whomever is in charge of the corporation's daily decisions regarding environmental protection, and would, no doubt, bear heavily upon regional or local managers where failures to regard consequences would be expected to subject their employer to loss. The $4.35 million award is not so large, however, as to "implicate[ ] the federal interest in preventing individual States from imposing undue burdens on interstate commerce." *BMW*, 517 U.S. at 585, 116 S.Ct. 1589.

We conclude therefore, that substantial punitive damages are warranted for deterrence and, since the actual damages are quite small, must be somewhat disproportional to the actual damage award. The ratio of the district court's reduced award of $4.35 million to the administrative fine of $10,000 is significant, but the Georgia statutes provided fair notice to CE that it might be subject to a substantial penalty for pollution of the streams running though its property. The 100:1 ratio of the punitive to the actual damages is at the upper limits of the Constitution, but is justified by the need to deter this and other large organizations from a "pollute and pay" environmental policy. Under the circumstances of this case, then, $4.35 million in punitive damages is not so disproportional as to offend the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence." *BMW*, 517 U.S. at 574, 116 S.Ct. 1589.

We hold, therefore, that $15 million was a constitutionally excessive punitive damage award in this case, and the district court correctly reduced it to $4.35 million, the maximum the Constitution permits in this case.

VII.

Two issues remain for our review. First, are property owners entitled to post-judgment interest on the original punitive damage judgments? Second, is CE entitled to a set-off of the amounts paid by it in settlement of some of the property owners' claims?

1. *Post-Judgment Interest*

The district court ordered interest on the punitive damages to run from June 9, 1997, the date it entered the reduced judgments totaling $4.35 million, rather than from June 16, 1994, the date of

the original (remitted) judgments totaling $15 million. Plaintiffs assert that the district court erred in so doing.[37]

The determination of when interest begins to accrue on a money judgment is based on 28 U.S.C. § 1961 which provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment....

The question in this case is when "the judgments" as to punitive damages were "entered". Was it on June 16, 1994, when the initial judgment of $15 million was entered, or was it on June 9, 1997 when the district court entered the reduced judgment of $4.35 million?

The law on this issue is clear. The Supreme Court has held that postjudgment interest compensates the successful plaintiff for being deprived of compensation for the loss from the time between the "ascertainment of the damage" and the payment by the defendant. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835-36, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (citing *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir.1987)). Where the judgment is not supported by the evidence and is vacated and damages are determined by a new trial, the damages were not "ascertained" in any meaningful way until the entry of the second judgment. *Id.*

When an original judgment is not completely vacated, the date from which post-judgment interest runs turns on the degree to which the original judgment is upheld or invalidated. *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 98 (3d Cir.1993). Where the initial judgment is supported by the evidence and the later judgment merely reflects a remittitur of a certain portion of that judgment as excessive, the courts of appeals have routinely

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[37] CE argues that property owners waived this argument by not presenting it to the district court. This argument is without merit because "interest accrues from the date of a judgment whether or not the judgment expressly includes it, because 'such interest follows as a legal incident from the statute providing for it.'" *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382, 1383 (9th Cir.1992) (citations omitted).

decided that damages were sufficiently "ascertained" at the time of the first judgment and that post-judgment interest should run from the date of the original judgment. *Dunn v. HOVIC*, 13 F.3d 58, 61 (3d Cir.1993); *Coal Resources v. Gulf & Western Industries*, 954 F.2d 1263, 1274-75 (6th Cir.1992); *Tinsley v. Sea-Land Corp.*, 979 F.2d 1382, 1383 (9th Cir.1992); *Masinter v. Tenneco Oil Co.*, 934 F.2d 67, 68 (5th Cir.1991); and *Affiliated Capital Corp. v. Houston*, 793 F.2d 706, 709 (5th Cir.1986).

These courts have reasoned that a remittitur merely reduces the damages by a distinct amount easily determined from the facts of the case. *Coal Resources*, 954 F.2d at 1275. The initial judgment is viewed as correct to the extent it is permitted to stand, and interest on a judgment partially affirmed should be computed from the date of its initial entry. *Tinsley*, 979 F.2d at 1383.

We think this reasoning is especially applicable in the context of a constitutionally excessive verdict. The jury's punitive damage awards were correct to the extent of $4.35 million. The clearly identifiable excessive portion has been stricken, but the remaining portion is just as clearly identifiable. Accordingly, this case is governed by the rule that post-judgment interest runs from the date that damages are clearly ascertained, which, to the extent of the $4.35 million we affirm today, was the date of entry of the initial judgment—June 16, 1994.[38]

2. *Set-off*

Finally, with respect to CE's claim to a right of set-off with regard to the amount paid by it in settlement of three of the plaintiffs' claims, CE cites no supporting authority and we can find none. Furthermore, the settlement agreements recite that "no part of the settlement amounts" be considered punitive damages. Having determined that punitive damages totaling $4.35 million do

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[38] We also reject CE's argument that the district judge took into account his intention not to permit interest to date back to 1994 in determining the maximum constitutionally permissible punitive damages in this case. Even if he did, we do not believe that the statute permits the discretion to start the accrual of interest at some time other than when damages are "ascertained."

not offend the Constitution, we find no reason to set off any amounts CE has already paid in settlement.[39]

VIII.

We hold that the Constitution permits punitive damages in this case totaling $4.35 million. Post-judgment interest on the punitive damages accrues from the date these damages were ascertained, which, on the amounts we affirm today, was on June 16, 1994. CE enjoys no right to a set off of amounts paid by it in settlement of property owners' judgments.

Accordingly, the district court's judgment in each case is AFFIRMED; VACATED as to the date of accrual of post-judgment interest which shall run from June 16, 1994; and REMANDED.

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[39] The court has received some correspondence indicating that a settlement may have been reached with some of the remaining ten plaintiffs (or groups of plaintiffs). Any further settlements and dismissals of individual plaintiffs would, of course, result in the removal of that judgment from the case. As the district court applied a multiplier of 100 to each plaintiff's compensatory award to arrive at his constitutionally appropriate punitive award, resulting in the aggregate award of $4.35 million, the elimination of that plaintiff's individual judgment would result in a proportional reduction of the aggregate punitive damages awarded and, therefore, in a corresponding reduction in the relevant ratios. Thus, our holding today would also remain applicable.

APPENDIX B

Cheryl Maloof JOHANSEN, et al., Plaintiffs,

v.

COMBUSTION ENGINEERING, INC., Defendant.

No. CIV. A. CV 191-178.

United States District Court,

S.D. Georgia.

June 9, 1997.

ORDER

In the above-captioned case, Plaintiffs, twenty-three landowners of sixteen different properties located downstream from Defendant's Graves Mountain mining operation, sued Defendant Combustion Engineering, Inc. ("Combustion") in trespass and nuisance for the obstruction and pollution of the streams on Plaintiffs' properties. The jury awarded Plaintiffs in the aggregate $47,000 in compensatory damages and $45 million in punitive damages on June 29, 1993.

This Court denied Combustion's motion for judgment as a matter of law and rejected Combustion's argument that a new trial was warranted because the punitive damages award was the product of jury passion and prejudice. However, at a hearing on April 25, 1994, I concluded that the $45 million award was excessive and thus a new trial was warranted unless Plaintiffs accepted a remittitur. The amount of the remittitur was undisclosed to the parties at the hearing in the hope that the parties would reach a settlement on the remaining issues in the case. The $45 million punitive damages award was finally remitted to $15 million by written judgment orders of June 16, 1994. Consequently, I did not enter any findings of fact concerning the method by which the $15 million verdict was reached or the reasons supporting such a verdict into the record of this case.

The Eleventh Circuit Court of Appeals affirmed the award without written opinion. Defendant petitioned the award to the United States Supreme Court for a writ of certiorari on two

grounds: 1) that the $15 million award was so excessive that it violates due process, and 2) that the original $45 million award was so excessive that it reflects jury passion and prejudice that may be cured only by a new trial. The Supreme Court granted the writ, vacated the punitive damages award, and remanded the case to the Eleventh Circuit for reconsideration in light of the Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). The Eleventh Circuit, in turn, remanded the case to this Court.

The *BMW* case provides guidance to a district court in its assessment of whether a punitive damages award is unconstitutionally excessive. Indeed, an award violates the requirements of due process if it is "grossly excessive" in relation to a state's "legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, 116 S.Ct. at 1595. In the *BMW* case, the plaintiff received an award of $4 million in punitive damages against an automobile distributor which had a policy of selling vehicles without disclosing that the vehicle had suffered pre-sale damage of less than 3% of the suggested retail price. *Id.* at 1593. The compensatory damages verdict was only $4,000. *Id.* The Court held that even the remitted amount of $2 million was unconstitutionally excessive. *Id.* at 1604. The Court identified the following three "guideposts" for assessing whether an award is grossly excessive:

a) the degree of reprehensibility of the defendant's conduct;

b) the ratio between the harm or potential harm suffered by the plaintiff and the amount of the punitive damages award; and

c) the difference between the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct.

Id. at 1598-99.[1]

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[1] While the *BMW* Court considered whether a state law punitive damages award entered in a *state* court violated the due process clause, the constitutional inquiry in this case is necessary because a federal court exercising jurisdiction based upon diversity sits as any other court of its

On remand in this case, Plaintiffs filed a motion to reconfirm the $15 million punitive damages award. In so doing, Plaintiffs argue that the *BMW* case does not affect the punitive damages award in this case because this Court rigorously examined the punitive award when it reduced it by two-thirds; thus, Defendant Combustion received adequate procedural safeguards in the imposition of the award. Contrary to Plaintiffs' contention, however, I did not apply the legal standard articulated by the Supreme Court in *BMW*. In fact, I did not articulate any part of my reasoning or analysis for the remitted amount in the record because of the use of the remittitur as a settlement tool. Hence, this Court, must now review the punitive damages award with the guidance of the *BMW* case as directed by the order of remand.

I note initially that the *BMW* decision does not bear upon or impact the adequacy of the jury charge given in this case as it relates to punitive damages, because the imposition of punitive damages by a jury is a matter of state jurisprudence. Instead, the *BMW* case provides guidance for district courts to address the issue of remittitur of a punitive damages award. Accordingly, I will now turn to the assessment of whether the $15 million award in this case transcends the constitutional limit.[2] Of course, Plaintiffs argue that the guideposts identified by the Court support the award in this case. I disagree.

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forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

[2] On remand, Defendant has once again argued that the original $45 million verdict was the product of passion, prejudice or bias, thus entitling it to a new trial. I have already carefully considered this argument, and I determined that while the award may have been excessive, "[t]here was no way that I [could] make a finding that this trial was fundamentally unfair on the basis of any suggestion or intonation of prejudice or bias...." (Tr. at 95, Hr'g of Apr. 25, 1994). Because the *BMW* case does not alter the legal standard by which I had made this determination, I will not address the matter again. Accordingly, Defendant Combustion's petition for a new trial is rejected.

1. *Reprehensibility*

The *BMW* Court stated that "punitive damages may not be 'grossly out of proportion to the severity of the offense.'" 116 S.Ct. at 1599 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991)). At the outset then, it is essential to determine the nature of the offense or the conduct of the defendant that is being punished.

The relevant conduct in this case involves only the four years preceding the filing of Plaintiffs' Complaint in September of 1991.[3] During this time period, the mining site on Graves Mountain was not operated by Combustion, which had only recently reacquired the property from Pasco Mining Inc. in 1986 after Pasco defaulted on its obligation to Combustion.[4] In fact, at this time Combustion put into effect a land reclamation plan, which had been approved by the Georgia Environmental Protection Division, designed to restore the property and control the acidic rainfall problem that had become evident. Pursuant to the plan, Combustion had actively attempted to prevent acidic water from entering the streams emanating from its property, but those attempts were not entirely successful. At all times, Combustion cooperated with the Environmental Protection Division to deal with recurrent problems of acidic water discharge or seepage. Thus, during the relevant time period, it would appear that Combustion's most egregious conduct was the failure to do more to prevent the acidic water problem.

The Court acknowledges that in awarding punitive damages in this case the jury found that Combustion acted with "specific

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[3] Where a trespass or nuisance is continuing in nature, an action may be maintained for all damages accruing during the four-year period preceding the filing of an action. O.C.G.A. § 9-3-30; *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir.1994) (citation omitted).

[4] Actually, the mine reverted back to Combustion Chemicals, Inc., a wholly-owned subsidiary of Defendant Combustion. Combustion Chemicals, Inc., had operated the mine prior to the sale to Pasco in 1984. In 1990 Combustion Chemicals, Inc., merged with Combustion.

interest to cause harm" to Plaintiffs' properties in order to surpass the $250,000 statutory cap[5] on punitive damages. The jury was charged that it could infer from the surrounding circumstances that Combustion had a specific intent to cause harm; that is, while a general conscious indifference to cause harm is not sufficient to infer specific intent, the jury could infer specific intent from a finding that Combustion's actions showed a want of care rising to the level of conscious or deliberate indifference to the consequence of its actions. Indeed, a review of the evidence shows that the jury must have inferred specific intent from a finding of deliberate indifference because there is no direct evidence of specific intent to cause harm in the record of this case.

This jury determination, however, does not necessitate a finding that Combustion's conduct was reprehensible as that term is described in the *BMW* case. Combustion did not act with intentional malice or cause physical injury in failing to prevent acidic water drainage into the streams. The evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of any kind after it reacquired the property. It did not commit illegal acts, knowing or suspecting that the acts were illegal. In fact, Combustion responded to any criticisms or penalties levied against it by the Environmental Protection Division in a positive, more aggressive manner. Hence, there is no evidence that Combustion is a recidivist that continually repeats certain misconduct.

While it is true that Combustion's actions created the situation through decades of mining on Graves Mountain, that conduct is not subject to sanction in this case. The misconduct here involves Combustion's failure to more aggressively prevent the acidic water contamination. In this respect, it should be remembered that in the late 1980's the science of reclamation was a developing one. Indeed, it still is. No one can predict with great certainty what scientific processes will eliminate or even alleviate the very real environmental problems confronting us. It is a process of trial and error in which Combustion has been actively involved. Notwithstanding this fact, I recognize that environmental protection

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[5] O.C.G.A. § 51-12-5.1(f)-(g).

is extremely important, and I will not sanction Combustion's failure to do its absolute best to confront the problems on Graves Mountain. Even so, "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish that high degree of culpability that warrants a substantial punitive damages award"[6] as exacted here. Accordingly, as the "most important indicium of the reasonableness of a punitive damages awarded,"[7] the award is simply not commensurate with the degree of reprehensibility of Combustion's conduct for the relevant time period.

2. *Ratio of Punitive and Compensatory Damages*

The second guidepost identified by the Supreme Court involves an assessment of the disparity between the actual or potential harm to Plaintiffs and the amount of the punitive damages award. *BMW*, 116 S.Ct. at 1601. In this case, Plaintiffs were awarded $47,000 in the aggregate in compensatory damages. The aggregate $15 million punitive award gives rise to a 320:1 ratio of the two awards. The ratios of punitive damages to compensatory damages as to the individual Plaintiffs in this case are even more extreme:

Plaintiffs	Compensatory Damages	Original Punitive Award	Ratio	Remitted Punitive Award	Ratio
Walter Collins McGill, et al.	$10,000	$3,000,000	300:1	$1,000,000	100:1
Jerry L. Maloof and Cheryl Maloof Johansen	$10,000	$6,000,000	600:1	$2,000,000	200:1
Clarence E. Norman, Sr.	$7,500	$3,000,000	400:1	$1,000,000	134:1

[6] *BMW*, 116 S.Ct. at 1601.

[7] *BMW*, 116 S.Ct. at 1599.

Plaintiffs	Compensatory Damages	Original Punitive Award	Ratio	Remitted Punitive Award	Ratio
Lawrence S. Peeler	$5,000	$3,000,000	600:1	$1,000,000	200:1
R.H. Beckum	$3,000	$3,000,000	1000:1	$1,000,000	334:1
Raleigh M. Long, Sr.	$2,000	$3,000,000	1500:1	$1,000,000	500:1
Oleeta D. Britt and Mildred D. Goldman	$2,000	$6,000,000	3000:1	$2,000,000	1000:1
Barnard Allen Danner	$2,000	$3,000,000	1500:1	$1,000,000	500:1
William E. Jones	$1,500	$3,000,000	2000:1	$1,000,000	667:1
Walter Colins McGill	$1,000	$3,000,000	3000:1	$1,000,000	1000:1
Gregory B. Richard	$1,000	$3,000,000	3000:1	$1,000,000	1000:1
Raymond H. Jones	$1,000	$3,000,000	3000:1	$1,000,000	1000:1
Martha Jones Long	$1,000	$3,000,000	3000:1	$1,000,000	1000:1

I do not want to imagine the nature of egregious conduct in the environmental arena that would justify ratios of this magnitude. Certainly in this case the aggregate ratio of 320:1 bears no reasonable relationship to the amount of harm or even potential harm suffered by Plaintiffs. In fact, when considering the potential harm to Plaintiffs, I must point out that Combustion has made and continues to make reasonable efforts to minimize acidic water pollution with some success.

The *BMW* Court carefully noted that there is no simple mathematical formula with which to draw a constitutional line

between what is and what is not too excessive. *Id.* at 1602. Therefore, it is possible that a low award of compensatory damages may properly support a higher ratio than a high compensatory award, if the conduct is particularly egregious. *Id.* However, even in a case that involved conduct amounting to intentional fraud, the relevant ratio was not more than 10:1. See *TXO Production Co. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711 (1993), cited in *BMW*, 116 S.Ct. at 1602. That is not to say that the Supreme Court has drawn any constitutional line at a 10:1 ratio. However, it is absolutely clear, as discussed above, that the degree of reprehensibility in this case is not very severe, and thus, Combustion's conduct does not support a punitive award that is 320 times more than the compensatory damages. Accordingly, the second factor militates against the reconfirmation of the punitive damages award.

3. ***Civil and Criminal Penalties for Similar Misconduct***

The third guidepost calls for a comparison of the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct. *BMW*, 116 S.Ct. at 1603. In Georgia, statutes provide for fines of up to $100,000 per day per violation as well as imprisonment terms. Plaintiffs argue that the statutory penalty of $100,000 a day should be used in comparison to the punitive damages actually assessed. If this were a fair measure, this Court could then condone a punitive award verdict in the amount of $146 million over a four-year period for a $47,000 compensatory case. It is more reasonable to assess the actual conduct of the defendant that is subject to punishment. In the *BMW* case, the Court directed that legislative judgments concerning appropriate sanctions be accorded "substantial deference." Id. at 1603 (citation omitted). Likewise, the administrative agency that is empowered to actually impose the applicable fines should also be given such deference in this case because of its environmental expertise. In this case, the Environmental Protection Division has seen fit to impose only a $10,000 fine. The remitted punitive award is 1500 times that amount. The imposition of this award, which is grossly disproportionate to the penalties that Combustion

has suffered or has come to expect,[8] would not comport with the fair notice requirements of the Constitution.

Conclusion

Given the above considerations, I find that the remitted amount of punitive damages is excessive. Therefore, Plaintiffs' Motion to Reconfirm the Punitive Damages Award is **DENIED**. However, a punitive damages award is justified, and the jury's affirmed verdict should be honored in part. Having carefully reassessed the evidence and the conduct of Combustion at all relevant times in this case, I find that a multiplier of 100 to each Plaintiffs' compensatory award is an appropriate assessment of the punitive damages award. Accordingly, the judgments of June 16, 1994 [docket nos. 202-203, 205, 207- 208, 210-214] are hereby **VACATED**.[9] The clerk shall enter the following judgments as to each listed Plaintiff in the amount of combined damages (compensatory and punitive) listed in the last column on the right:

Plaintiffs	Compensatory Damages	Punitive Damages Award	Combined Award of Damages
Lois A. McGill*	$10,000	$1,000,000	$1,010,000 plus interest
Samuel Clary McGill Katherine McGill Lamar Jenida S. McGill** Inez M. McWhorter***			

[8] Defendant Combustion has provided a list of penalties assessed by the Environmental Protection Division against various entities for environmental violations since 1987. Def.'s Opening Br. on Rem., App. 2. The largest monetary punishment imposed in $150,000. The punitive award in this case would still be 100 times that amount.

[9] This Order does not affect the prior judgments pertaining to those Plaintiffs who have settled with Combustion to include William E. Jones, Martha Jones Long, and Raymond H. Jones [docket nos. 204, 206 and 209, respectively].

Plaintiffs	Compensatory Damages	Punitive Damages Award	Combined Award of Damages
Kathleen McGill Beggs Cherry McGill Rowland Eugene H. McGill, Jr. James Curtis McGill Elizabeth Bevel McGill Jerry L. Maloof	$10,000	$1,000,000	$1,010,000 plus interest
Cheryl Maloof Johansen Clarence E. Norman, Sr.	$7,500	$750,000	$757,500 plus interest
Lawrence S. Peeler	$5,000	$500,000	$505,000 plus interest
R.H. Beckum	$3,000	$300,000	$303,000 plus interest
Raleigh M. Long, Sr.	$2,000	$200,000	$202,000 plus interest
Oleeta D. Britt	$2,000	$200,000	$202,000 plus interest
Mildred D. Goldman Barnard Allen Danner	$2,000	$200,000	$202,000 plus interest
Inez M. McWhorter***	$1,000	$100,000	$101,000 plus interest
Gregory B. Richard	$1,000	$100,000	$101,000 plus interest

* Lois A. McGill has been substituted as a plaintiff in this action as the Executrix of the Estate of Walter Collins McGill.
** Jenida S. McGill has been substituted as a plaintiff in this action as the Executrix of the Estate of Aubrey G. McGill.
***Inez M. McWhorter has been substituted as a plaintiff in this action as the Administratrix of the Estate of A.C. McGill and Executrix of the Estate of Lillian Inez Norman McGill, estate positions formerly held by Walter G. McGill, deceased.

Additionally, these listed Plaintiffs are entitled to post-judgment interest at the federal rate on their respective compensatory damages award and on their litigation expenses

awarded by the jury in the amount of $227,000 from the date of the original judgments in this action, July 7, 1993. Interest at the federal rate on their respective punitive damages award shall be taxed against Defendant from the date this Order is entered.

ORDER ENTERED at Augusta, Georgia, this 9th day of June, 1997.

/s/ Dudley H. Bowen, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8726

FILED: June 2, 1999

CHERYL MALOOF JOHANSEN, MILDRED D. GOLDMAN, et al., Plaintiffs-Appellees, Cross-Appellants,

AUBREY G. MCGILL, WILLIAM E. JONES, Plaintiffs,

versus

COMBUSTION ENGINEERING, INC., Defendant-Appellant, Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ____F.2d____).

Before: ANDERSON, and BARKETT, Circuit Judges, HILL, Senior Circuit Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
SEP 10 1999
OFFICE OF THE CLERK

No. 99-252

IN THE

Supreme Court of the United States

COMBUSTION ENGINEERING, INC.,

Petitioner,

v.

LOIS A. MCGILL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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September 10, 1999

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BRIEF IN OPPOSITION

Respondents Lois A. McGill, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari filed by Combustion Engineering, Inc. ("Combustion") in this case.

STATEMENT OF THE CASE

This water pollution case involves a punitive damage award of $1 million, not "a punitive award of over $4,000,000" as Combustion suggests in the opening sentence of its petition. Pet. 1. The $1 million punitive award that Combustion has actually brought before this Court is the last remaining judgment in a set of 13 separate judgments entered against Combustion as a result of its pollution of Graves Mountain, Georgia. Combustion has chosen to settle 12 of these 13 judgments, and it contests before this Court only the $1 million punitive award held by respondents.

In light of these settlements — the discussion of which Combustion relegates to a footnote in the middle of its petition, *see* Pet. 10 n.3 — Combustion, through its own actions, has failed to present a live controversy concerning the "punitive award of over $4,000,000" that "the court of appeals sustained," which is the central focus of its petition. Pet. 1. The petition should be denied for this reason alone.

The reasonableness of the $1 million punitive award still at issue in this case is plain from the undisputed fact established at trial that Combustion retained at least $6 million in extra profits through its failure to employ proper remediation measures on its Georgia minesite between 1987 and 1993. Tr. 1216-17.[1] As a result, the owners of the land surrounding Combustion's minesite, including respondents here, suffered from severe pollution in their streams. This violated well-settled Georgia law, which gives the surrounding landowners an absolute right against such a trespass

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[1] The trial transcript, which appears in Volumes 9 and 10 of the record, is cited throughout this opposition as "Tr. ___." The transcript of the hearing on the posttrial motions held on April 25, 1994, which appears in Volume 12 of the record, is cited as "4/25/94 Tr. ___."

on their riparian rights, even with reference to a mining company such as Combustion that could derive enormous benefit from polluting streams rather than cleaning up the pollution before it reaches the streams in question.

In order to recover more than $250,000 each in punitive damages, under controlling Georgia law plaintiffs were required to demonstrate, by clear and convincing evidence, that Combustion acted with specific intent to cause harm. The jury, district court (twice), and the court of appeals (twice) all determined that such specific intent to cause harm was shown.

To strike the punitive award would effectively give Combustion and similarly situated wrongdoers a power of *private* eminent domain to trespass intentionally on the property of others by appropriating their waterways to serve as waste-disposal systems for toxic materials. The relief Combustion seeks would undermine the ability of the States to protect private property rights — allowing defendants, backed by the federal judicial power, to engage in government-enforced private takings of property that would themselves raise serious questions under the "public use" requirement of the Takings Clause. Thus, although the federal Constitution is typically invoked as a constraint on damage awards, here the Fifth Amendment affirmatively supports upholding the punitive award as reasonable.

A. Statement of the Facts

During the relevant time period Combustion knew that, absent concerted efforts both at reclamation (i.e., long-term restoration) and remediation (i.e., immediate pollution treatment), huge quantities of toxic pollutants would flow into the four streams running onto the land of the surrounding landowners (hereinafter, "plaintiffs"), which in this litigation have been referred to as the Goldman, Long, Maloof, and McGill streams. To keep as much profit as possible, Combustion for years made only trivial reclamation efforts and no attempts at remediation, in the process retaining at least $6 million in extra profits. Not until

1991, five years after mining stopped, did Combustion begin remediation efforts on *any* of plaintiffs' streams. Even then, Combustion acted only because it was ordered to do so by state authorities and had already been sued by plaintiffs. The vast majority of Combustion's cleanup efforts occurred after suit was brought in this case in August 1991, and after the State of Georgia cited Combustion for a violation of law — a point not mentioned by Combustion in its continuing effort to claim credit for efforts taken under compulsion. *See* Pet. 3-5. Moreover, virtually all of the cleanup efforts that Combustion did make were focused on dismantling its plant and on relatively cheap *reclamation* efforts on its *own* land that did not benefit plaintiffs. The evidence at trial showed that Combustion made no serious effort to use readily available, effective measures to *remediate* the acid mine drainage being released onto *plaintiffs'* property, despite full knowledge that plaintiffs' streams were being polluted.

1. ***Combustion deliberately refused for years to adopt adequate cleanup measures***. When mining ceased on Graves Mountain in 1986, the site had been reduced to a cratered, rock-strewn plateau whose sides were pock-marked with at least 166 acres of open ditches, dams, and tailings ponds. *See* DX-12 at 1, 4-5; *see also* PX-3 (aerial photo of minesite taken in 1991).

The tailings in these open storage pits contained large quantities of pulverized pyrite which, when exposed to water and oxygen, creates sulfuric acid. Tr. 178-79. Through its failure to follow the standard industry practice of reclaiming the land while the mining was ongoing, Tr. 941, 1217, Combustion had created a "continuous supply . . . of sulfuric acid" that caused the water to become dangerously acidic (by lowering its pH) and to dissolve and transport heavy metals like iron, manganese, and aluminum. Tr. 99, 177-79. Streams were more prone to erosion and flooding. Tr. 181-82. Expert testimony established that "[y]ou have acid mine drainage coming from the old tailing and pyrite ponds and much of that is coming from the seepage from those areas and sub-surface flow. So it is not just a problem that you have when there

is a rainfall event." Tr. 107-08. It is this water — thousands of times more acidic than normal, and laced with toxic heavy metals — that has regularly flowed onto plaintiffs' property. *E.g.*, Tr. 108-10, 111-12, 178-82, 185, 190-92; PX-12 at 2.

Combustion failed to make any cleanup efforts for at least two years after mining ended in 1986, despite its obligation under a cleanup plan filed with state regulatory officials in 1985. *See* Court's Exhibit 1. The plan was designed to "protect[] adjacent watersheds" (cover page), and it specifically promised state regulators that no water "will be allowed to leave or flow from affected lands without proper treatment" meeting state and federal effluent standards (e.g., pH no lower than 6.0). *Id.* at 9. In particular, "to protect contiguous natural resources from suspended or dissolved solids," *id.*, the plan required Combustion to employ "timely and sufficient" remediation and reclamation techniques. The plan required that the cleanup be completed within 18 months, *id.* at 5 — a time limit that is standard industry practice. Tr. 717.

Combustion did not meet this deadline, and internal company memoranda showed that the delay was intentional. One memo, dated October 27, 1987, stated that the Georgia Department of Natural Resources ("DNR") was greatly concerned with acid mine drainage. PX-23, at 1. Rather than proposing action, the memo stated that Combustion's "relationship" with regulators "has been and should continue to be cultivated." *Id.* at 2. Another memo explained that the DNR official in charge of Graves Mountain — who had been pursuing the matter vigorously — was being replaced. The memo reported that the personnel change was "good news for [Combustion] because of the good working relationship we have established" with the replacement official. PX-39, at 1.

Even so, the DNR repeatedly raised concerns with Combustion about the pollution problem. For example, as a Combustion official summarized an October 1987 meeting:

> The single most important concern of the DNR is present and potential acid run-off. Mr. Tinley [a DNR official] produced a map on which had been noted several pH readings from streamlets in the area with origins both from the site works and natural springs. Although the natural springs from the area exhibited relatively low pH's of around 5, the water from the site works showed pH's of around 2.25 to 3 [hundreds of times more acidic than the natural streams].

PX-23 at 3. The DNR conducted some 70 pH tests; almost half demonstrated pH levels 1,000 times more acidic than normal. PX-7, PX-9. Despite this notice, by early March 1988 — when Combustion was supposed to have finished cleaning up Graves Mountain — the sum total of its supposed response had been to take a total of 10 pH readings from unimpacted streams and certain ditches and ponds, and to contemplate "plans" for future action. Tr. 947; PX-39; DX-5.

On March 15, 1988, Broughton Caldwell, a DNR scientist, visited the mountain to do more tests. He confirmed that pH values were highly acidic; that "iron precipitate" coated the leaves in the stream at one site; and that insect communities at each site were close to nonexistent. He concluded that the lack of biological diversity or abundance was related "in large part to the low pH values" and resulting "strongly acidic" water. PX-7. The day after Caldwell completed his study, DNR officials met with Combustion and reemphasized their concerns about "controlling . . . water discharge." PX-39. Combustion then agreed to begin some "preliminary work" "next week" and submit a "reclamation program and schedule . . . to the DNR." *Id.*

Yet after being notified in 1987 and 1988 by the DNR of the severe pollution flowing into plaintiffs' streams, Combustion failed to continue testing the streams, neglecting even to monitor the level of acid mine drainage that it knew was flowing onto plaintiffs' property. Tr. 372-73, 374, 391-92. Not until the end of 1988 — more than two years after the cessation of mining — did

Combustion adopt a revised reclamation plan. A county environmental health specialist testified that the measures consisted of "smooth[ing] up the roads, plant[ing] some grass," Tr. 539, which would clear up the pollution in plaintiffs' streams only indirectly and only after many years. Revegetation is necessarily a long-term cleanup measure because the vegetative cover has little, if any, effect on the pollution problem until it reaches the requisite thickness and maturity. Tr. 1017. John Brett, a top Combustion executive personally in charge of the site, testified that his hope was no more than that these reclamation measures would "evenually" stop the flow of pollution. Tr. 952.

Plaintiffs' expert witness, Dr. Claude Terry, testified that Combustion's efforts were "trivial." Tr. 748. Indeed, Dr. Terry testified that, in practice, Combustion did not follow its own plan. Tr. 737. For example, Combustion attempted to avoid its obligation under the 1985 reclamation plan to bury the tailings and pyrite ponds under four feet of topsoil to prevent oxidization of the pyrite, by starting the "West Pond 1" project, a futuristic greenhouse experiment in which Combustion scientists attempted to grow a kind of "miracle grass" — ground cover that could somehow thrive on bare mill tailings (toxic pulverized rock) that contained "considerable acidity" and were "almost devoid of nutrients essential to plant growth." DX-15 at 1, 3. Not surprisingly, this experiment failed; at the time of trial, nothing was growing on these areas, which Combustion had simply left bare. PX-3.

Combustion failed to correct the pollution problem even after a lawsuit was filed in May 1988 by other neighbors of Combustion on Graves Mountain. *Combustion Chemicals, Inc. v. Spires*, 433 S.E.2d 60 (Ga. App. 1993), *cert. denied*, 1993 Ga. LEXIS 969 (Oct. 12, 1993). The issue was brought into special focus at trial through the testimony of John Brett, who testified that the sole reason that remediation measures were not started prior to plaintiffs' suit in August 1991 was that "we never had reason to believe there was a problem there." Tr. 965. Brett was ultimately forced to concede that Combustion knew of the acid mine drainage

problem at least as early as May 1988, because plaintiffs' counsel confronted him with the fact that the *Spires* lawsuit had been filed at that time and that Brett had actually sat through the *Spires* trial. Tr. 291.

The jury also heard the test results of environmental consultants hired by Combustion in 1989 during *Spires*, which confirmed the existence of pollution and demonstrated that Combustion knew of the acid mine drainage problem long before plaintiffs filed their lawsuit in 1991. The first study, conducted by Dames & Moore in 1989, compared three of the streams running across plaintiffs' property (the McGill, Long, and Goldman streams) to a reference stream unimpacted by mining activity. Plaintiffs' three streams had pH levels as low as 2.6, thousands of times more acidic than the water sampled at the unpolluted reference stream; specific conductivity levels as high as 2,210, approximately 18 times higher than normal; and dissolved iron levels up to 199 milligrams per liter, over 200 times those of the reference stream. PX-12 at 2. The second study commissioned by Combustion in 1989, conducted by Drs. Arnold and Miller (two agronomy professors at the University of Georgia), focused on the Long stream and produced similar results. PX-13.

2. ***Combustion's 1991 cleanup efforts were initiated only under heavy pressure on two fronts.*** In the summer of 1991, Combustion finally began addressing the pollution that had been flowing into plaintiffs' streams, essentially unchecked, since mining operations ended on Graves Mountain in 1986. Even Combustion's 1991 limited cleanup efforts directed toward plaintiffs' streams, which began five years behind schedule, came about only based on the pressure exerted by plaintiffs through their lawsuit, and by the DNR through its administrative action.

In June 1991, the DNR cited Combustion for "a violation of law" (the Georgia Water Quality Standards) involving acid mine drainage with a pH of 2.9 — more than 1,000 times more acidic than normal water — "coming from the pyrite pond and leaving the mine site," and discharges from the holding pond with a pH of

3.2. Tr. 984-85; *see also* Tr. 109. These discharges violated Combustion's permit. Tr. 984-85.

After plaintiffs filed the instant suit in August 1991, Combustion entered into a consent decree with the DNR in September 1991 in which Combustion was compelled to adopt certain remediation measures. By Combustion's own calculation, it had spent only $700,000 on reclamation measures between 1986 and June 1991. Tr. 389, 949-50. Uncontroverted evidence at trial established that by taking inadequate cleanup measures between 1987 and 1993, Combustion was able to retain additional profits of $6 million. Tr. 1216-17.

Moreover, Combustion did not take sufficient steps to ensure that even its new cleanup efforts were adequate. For example, the environmental consultant hired by Combustion to plan reclamation of the minesite, Jerry Williams, warned the company in a 1989 proposal that water would eventually leach away "most of the acidity from the material" in the tailings ponds and that this "would probably contribute to problems downstream," requiring liming and other remediation techniques. DX-15 at 3. Combustion, however, hired Williams solely to "revegetate" its own minesite; Williams was not asked to test or otherwise address the acid mine drainage going into plaintiffs' nearby streams. Tr. 1009-11, 1014. Nor was anyone else. Paul Hall, the Combustion official in charge of Graves Mountain between 1986 and 1990, admitted that Combustion's efforts were not aimed at addressing "whether or not there was acid mine drainage going on to the property of adjacent landowners." Tr. 392. This policy continued for the next *four years* after John Brett replaced Hall, through the time of trial in 1994. Tr. 311-15, 338-39, 990-92.

Dr. Terry, plaintiffs' expert witness, testified that it has been common knowledge within the mining community since the 1970s that both reclamation *and* remediation measures are necessary to stop acid mine drainage. Tr. 737, 1217-18. Dr. Terry further testified that the minesite was "treatable by a number of technologies." Tr. 192. Dr. Terry testified without contradiction that, to effectively reclaim the area, Combustion would have had

to: (1) "strip and reclaim the area as you go," which "typical" mine reclamation plans entail, Tr. 1217; *see also* Tr. 941; (2) add lime to the soil in the reclaimed area so that "when you do have flooding in an area [it] will increase the pH of any run off," Tr. 1217; (3) "use . . . clay caps" "to keep oxygen from coming into contact with potentially acidic materials such as pyrite," *id.*; and (4) build wetlands to "disrupt the flow" of water from the site, raise the water's pH and filter out dissolved heavy metals. Tr. 714-21. Combustion adopted none of these measures.

Even at the time of trial in June 1993, Combustion had failed to use the measures recommended by Dr. Terry to "remediate [the] toxic discharge." Tr. 734. Combustion's remediation efforts were limited to the water flowing into only one stream (the Goldman stream) of the four streams flowing across plaintiffs' property. Expert testimony established that these limited efforts did not stop the pollution in even this stream. Tr. 112-13, 170-71, 1043. A team of expert hydrologists found in 1992 that, despite Combustion's "treat[ing] the water coming out of the holding pond" into the Goldman stream, this stream showed a content of dissolved solids that was abnormally high, sulfate levels over 40 times higher than normal, a "tremendous amount of sediment," and "periodic releases of very low pH water from [the mine]site." Tr. 112-13, 170-71, 1043; PX-10.

Pollution continued to flow into all four of plaintiffs' streams as of the time of trial, Tr. 111-13, 158-59, 167-68, 175, 308-11, 517, 695-97, 725, as Combustion admitted. Tr. 126-27, 309, 1215-16. Plaintiffs' hydrology experts who examined the streams between January and September 1992 concluded that there was a "constant" "problem[] with acid mine drainage" flowing from the minesite (not merely a problem resulting only occasionally from rainfall). Tr. 107-08. The experts concluded that the streams "ha[d] been severely impacted" by acid mine drainage flowing from Combustion's property. Tr. 109-13, 121-122, 159, 161-62, 166-68, 170-71; PX-10. These conclusions were corroborated by the findings of a professor of stream ecology at the University of Georgia, who examined the streams in April 1992. Tr. 1043.

3. Combustion made no serious response to pre-1991 complaints that put it on notice of the pollution. Combustion asserts that plaintiffs rarely complained to it during the close to 20 years that it conducted mining operations on Graves Mountain, and that when owners of downstream properties did complain about escaping water, silt build-up or other problems, it responded decisively to remedy those problems. Pet. 3. Here, again, Combustion distorts the record.

The record reflects that, as early as the 1970s, the father of two plaintiffs (and their predecessor in title), repeatedly called Combustion's site manager to complain about untreated mine waste draining from one of the tailings ponds into the Maloof stream. Tr. 401, 414, 419-20. In 1982, an investigator from the DNR relayed complaints to the minesite manager about a large berm (earthen dam) underneath the west tailings pond that had leaked "[f]or years and years" and flowed across Hepzibah Church Road into the Long stream. Tr. 516. Another neighbor wrote to the county health department in 1986, complaining of fish dying in his stream, Tr. 538; his complaint was referred to the minesite manager. Tr. 539. A county health department official talked to Combustion's manager "numerous times" about problems with the streams, Tr. 539, and in 1991 conveyed his concerns to Combustion's attorneys as well. Tr. 539.

After it retook possession of the site in 1986, Combustion would likely have received even more complaints but for the fact that it has no office on Graves Mountain, receives no mail there, and stations no representative there to receive complaints. Tr. 990. The closest employee is 75 miles away. Tr. 991. Of course, as already discussed, Combustion was further put on notice of the pollution problems in 1988 and 1989 as a result of litigation brought against it by plaintiffs' neighbors, during which Combustion received reports from its own consultants documenting the high levels of pollution. See pp. 6-7, *supra*.

With respect to Combustion's assertion that it has diligently responded to all complaints, the record shows that Combustion, in general, responded to complaints by doing only "enough to

pacify" the neighbors so that they would "stay home and shut up." Tr. 420. For example, a county environmental official testified that he complained to Combustion about a leaky berm as long ago as 1977, but "[t]he leak is still there because they never did anything . . . to it" except to try to plug it with dirt and grass. Tr. 535-36. "The water still runs down through there." Tr. 517; *see also* Tr. 725 ("water is flowing again"). Combustion never even tested the water flowing from the seeps for which it received complaints. Tr. 992, 997, 1010, 1014. Further, Combustion made no effort to notify its neighboring landowners of the levels of pollutants being released into their streams, not even when there were sudden overflows of millions of gallons of polluted water (events of which plaintiffs only learned during discovery in this case). PX-10, Tr. 474, 481, 484, 1211-13.

B. Procedural History

Plaintiffs filed this suit against Combustion on August 9, 1991. As provided under Georgia law, plaintiffs elected to sue only for injunctive relief, together with compensation for loss of use and enjoyment, declining to press a claim for damages to the value of their property. This permitted them to preserve their ability to obtain injunctive relief and other future remedies with respect to the pollution of their streams.

A ruling in Combustion's favor on a motion *in limine*, entered on June 4, 1993, granted Combustion all the relief it sought against the introduction of supposedly prejudicial evidence, including evidence of regulatory violations by Combustion. R3-64.[2] During trial, Combustion objected to plaintiffs' attempt to introduce evidence on the value of the property polluted by Combustion. In so doing, Combustion agreed not to raise any future objection concerning the absence of such evidence, Tr. 622-

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[2] For citations to the record, the number immediately following the "R" is the volume number; the number after the dash is the docket entry number; if another number appears after a dash, it refers to a particular page in the document referenced.

23, 631-32, a promise that it has now forgotten. See p. 17, *infra*.

The trial was bifurcated so that the jury did not even consider punitive damages until it had first awarded compensatory damages — a method even more favorable to Combustion than the method provided for in Georgia state court by O.C.G.A. § 51-12-5.1(d). *See* 4/25/94 Tr. 57-58, 94. The jury awarded the plaintiffs a total of $47,000 for Combustion's interference with their right to the enjoyment and possession of their land, Tr. 1172-74, plus uncontested out-of-pocket expenses of $137,000 and attorney's fees of $90,000. Tr. 352, 1191. The $227,000 in expenses and fees was based on the jury's finding (never appealed) that Combustion had acted in "bad faith," *see, e.g.*, *Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977).

During the jury's deliberations on punitive damages, the district court announced its factual findings concerning the claim for equitable relief based on "the same evidence that the jury has heard." Tr. 1244. The district court found that Combustion had "committed a trespass against the land of the named plaintiffs," causing "substantial injury to the neighboring property." Tr. 1252. The court specifically noted the jury's finding that "the defendant had acted in bad faith." Tr. 1245.

To recover any punitive damages at all, plaintiffs were required as a matter of Georgia law — regardless of the federal Constitution — to prove by clear and convincing evidence that Combustion's actions "showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). To recover more than $250,000 each, plaintiffs were required to demonstrate, again by clear and convincing evidence, that Combustion acted "with the specific intent to cause harm." *Id.* at § 51-12.5.1(f). Asked to return an award that would "take the profit out of polluting" and deter and punish similar wrongdoing, Tr. 1240-41, the jury awarded punitive damages in the amount of $3 million to each of the 15 sets of plaintiffs (or their heirs) who owned the 16 parcels of land at issue, for a total of $45 million. Tr. 1255-57; Pet. App. 3a.

In ruling on Combustion's posttrial motions, the district court found the jury's $45 million award to be excessive, but held that $15 million would not be excessive and offered plaintiffs the option of electing a remitted award of that amount, in lieu of a new trial. The district court rejected Combustion's post hoc "theory to the effect that this defendant . . . had consistently followed, abided by and complied with all state laws and regulations and licensing requirements, [but] had been called to task in this courtroom and brought over a barrel." 4/25/94 Tr. 103. The court bluntly stated: "[T]hat's not the case." *Id.* The court further observed that the jury was entitled to conclude that the cleanup money spent by Combustion prior to plaintiffs' suit was "peanuts," simply designed to be "a cheap way of buying time," especially in light of "powerful evidence" that Combustion had spent the money not out of any concern for plaintiffs' riparian property rights, but only when compelled to do so by state regulators. *Id.* at 104-05.

The district court properly did not "abrogate the jury's verdict in its entirety" or "write it down to an insignificant" level. *Id.* at 109. The court recognized that, "if I am to preside over jury trials, take their time, take them away from their home, their offices and their labors, I have an obligation to support and defend their efforts." *Id.* at 108. Accordingly, the court announced that it would do "what the jury said to do, but I will do it in an amount that is sufficient, but not superfluous." *Id.* at 109. The court explained that a punitive award of $1 million would be "a mere inconvenience" — "as much corporate blood as a mosquito would draw." *Id.* The court made clear that it did not arrive at the $15 million figure lightly; to the contrary, the judge revealed that "I don't think that there has been a single 48-hour period that's gone by since June 25th, 1993, that I haven't thought about the amount of punitive damages in this case." *Id.* at 106.

The district court expressly held that the jury's verdict was *not* infected by passion or prejudice and categorically rejected any suggestion that "these proceedings were, in any way, contaminated or permeated by any aspects of prejudice or bias or favor or affection for or against either party." *Id.* at 92-93. "There is no

way that I can make a finding that this trial was fundamentally unfair on the basis of any suggestion or intonation of prejudice or bias or regional or national favoritism. It wasn't." *Id.* at 95.

On appeal, Combustion challenged the award on both state law and federal constitutional grounds. Combustion argued that there was insufficient evidence of willful misconduct and specific intent to cause harm. Yet the Eleventh Circuit soundly rejected Combustion's excessiveness objection, affirming the $15 million award in all respects without opinion, just one week after oral argument. 67 F.3d 314.

On petition for certiorari, this Court first held the petition (No. 95-1072) in abeyance pending *BMW v. Gore*, 517 U.S. 559 (1996), then vacated the judgments and remanded the case to the Eleventh Circuit, 517 U.S. 1217 (1996), which in turn remanded the case to the district court. The scope of the remand was limited to the effect of *Gore* on the judgments

The district court on remand reduced the punitive award to a total of $4.35 million, while acknowledging that "a review of the evidence shows that the jury must have inferred specific intent [to cause harm] from a finding of deliberate indifference." R8-266-6.

The Eleventh Circuit affirmed. It found that "the Georgia statutes provided fair notice to [Combustion] that it might be subject to a substantial penalty for pollution of the streams running through its property." Pet. App. 27a. The court of appeals also noted that "[t]he actual damages awarded were relatively small; yet the state's interest in deterring the conduct — environmental pollution — is strong. In order to achieve this goal, ratios higher than might otherwise be acceptable are justified." *Id.* at 26a. The court further held that the punitive award was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." *Id.* at 27a.

Subsequently, Combustion completed its settlements of 12 of the 13 judgments in this case, leaving only the $1 million punitive judgment held by the respondents.

REASONS FOR DENYING THE PETITION

Combustion's petition makes extensive reference to *other* cases in an effort to persuade this Court that this case should be used to resolve the question of whether a 100-to-1 ratio between punitive and compensatory damages is reasonable. Combustion's extensive reliance on other cases points to the first reason for denying the petition: this particular case is not an appropriate vehicle to review the question that Combustion has presented given factual peculiarities attributable to Combustion's tactical choices during this litigation.

Further, from the record of this case there is little reason to believe that the "ratio" arguments on which Combustion seeks plenary review, even if accepted, would affect the result of this case — providing a second reason why this Court should deny review in this case and address these "ratio" arguments further, if at all, in one of the cases in which such arguments might actually matter.

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED BY COMBUSTION

The inappropriateness of this case as a means of reviewing the question presented by Combustion is clear in two separate respects: (a) Combustion seeks review of the court of appeals' decision "sustain[ing] a punitive award of over $4,000,000," Pet. 1, yet it has settled the large bulk of this dollar total; and (b) Combustion's petition sets out a factual predicate for review that simply does not square with the record of this case. We discuss each in turn.

A. This Case Does Not Present the Question of the Reasonableness of a $4 Million Punitive Award

Combustion begins its petition by asserting that "the court of appeals sustained a punitive award of over $4,000,000." Pet. 1.

This statement is highly misleading. As Combustion well knows, it has deliberately chosen to settle 12 of the 13 punitive awards in the case. The remaining judgment, held by respondents, is for only $1 million, Pet. App. 39a — less than 25% of the total of $4.35 million in punitive judgments recently sustained below.

In and of themselves, these settlements make this case an unsuitable candidate for this Court's review. Combustion has strategically decided to resolve 12 of the 13 judgments against it, and to present only one for this Court to examine. Such artificial engineering will hamper a fair resolution in this case. The posture in which Combustion seeks to present this case to this Court is dramatically different from the posture in which the case was tried before a jury in 1993; from the posture in which the district court conducted its first posttrial review in 1994; from the posture in which the first appeal was heard in 1996; from the posture in which this Court vacated the then-extant judgments in light of *BMW v. Gore*; from the posture in which the district court conducted its second posttrial review in 1997; and from the posture in which the court of appeals heard the case below.

In short, the record in this case has been assembled, and the decisions below have been rendered, in a different setting from the one that Combustion now seeks to present to this Court. Both constitutional and prudential principles of justiciability strongly counsel against reviewing Combustion's arguments focusing on the "punitive award of over $4,000,000" that "the court of appeals sustained," Pet. 1, after which Combustion settled all but one of the judgments, thus mooting the issues earlier posed by the $4.35 million in punitive damages. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7, 3-8, 3-11 (3d ed. 2000).

Furthermore, the $1 million award remaining in this case is a poor candidate for assessing the ramifications of *BMW v. Gore* for punitive awards. The $1 million judgment held by respondents was produced by the district court as part of its 1994 weight-of-the-evidence remittitur procedure. See pp. 13-14, *supra*. The award has been untouched since that time. It was not produced by the district court's application of the *Gore* factors during its 1997

second posttrial review and it was left unchanged by the court of appeals' review of the judgments under the *Gore* factors.

B. The Question Framed by Combustion Is Not Presented By This Case

The question framed by Combustion is "whether a punitive award that is 100 times the compensatory damages is constitutionally permissible when the compensatory damages are more than nominal and the defendant's conduct is not reprehensible." Pet. i. This question is not in fact presented by this case for several reasons.

1. The ratio between punitive and compensatory damages in this case relied on by Combustion is largely meaningless, given unique aspects of the record created by Combustion's own tactical litigation choices. The award of use-and-enjoyment damages in this case simply cannot be viewed as representing compensation for all of "the actual harm inflicted on the plaintiff[s]," which this Court has instructed is the relevant focus. *Gore*, 517 U.S. at 580.

The $10,000 compensatory award for respondents' loss of use and enjoyment of their land reflects only one minor element of the actual harm caused by Combustion. Under Georgia law, plaintiffs were forced to waive their claim for loss of market value in order to preserve their right to injunctive relief. Tr. 17, 622-23, 629-32; R-3-63 at 13-17. The damages awarded plaintiffs thus do not include the injury done to the value of plaintiffs' land, or the cost of repairing the wrongs intentionally inflicted by Combustion. Tr. 629-30. In fact, at trial Combustion objected to plaintiffs' tender of evidence of the value of the land, Tr. 622-23, and the district court excluded such evidence based on Combustion's agreement that it would "not be heard, within the confines of this lawsuit, ever to complain that there has been a failure or an absence of any showing of fair market value or any disparity between the present polluted and non-polluted fair market value." Tr. 631-32. Combustion has effectively renounced this agreement and now seeks to have the matter both ways.

Under this aspect of *Gore*, any "ratio" evaluation of the punitive award must also place a value on the claim for injunctive relief, given that awards of nominal damages or equitable relief, without any recovery of compensatory damages, are enough to support an award of punitive damages under Georgia law. *Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977); *Hudgins & Co. v. J & M Tank Lines, Inc.*, 450 S.E.2d 221 (Ga. 1994), *cert. denied*, 1995 Ga. LEXIS 461 (Ga. Feb. 23, 1995). For example, the courts have long recognized that a claim for injunctive relief should be regarded as having monetary value for purposes of meeting jurisdictional amount requirements. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347-48 (1977); 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3708, at 239 (1998).

Moreover, the actual ratio between the punitive and compensatory awards here is approximately 4-to-1, not 100-to-1 as Combustion erroneously suggests. Respondents' compensatory award was not limited to $10,000 for the loss of the use and enjoyment of their land. It also included $227,000 awarded to all the plaintiffs (including respondents) for their out-of-pocket expenses and attorneys' fees based on the jury's finding (never appealed) that Combustion had acted in "bad faith." See p. 12, *supra*. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court considered the plaintiffs' litigation costs, as awarded by the jury, in computing the ratio between punitive and compensatory damages. *Id.* at 451, 453 (plurality opinion). Considering those costs here, which were a specific item of damages awarded by the jury to plaintiffs, produces a ratio of $1 million divided by $237,000, or about 4.2-to-1, not 100-to-1.

For all these reasons, the ratio cannot be computed based solely on respondents' $10,000 use-and-enjoyment award.

2. The ratio computed by Combustion is also meaningless because the use-and-enjoyment damages sustained by plaintiffs were difficult to quantify. The evidence showed that the injury

sustained by plaintiffs was severe, both economic and non-economic. Combustion's pollution rendered the streams unsuitable for "normal usage or recreational or farm purposes," Tr. 161, and it interfered with plaintiffs' attempts to raise cattle, Tr. 400, 403-05, 427, 429, 430, 432, 499, 554; rent their land, Tr. 576, 577, 580, 644, grow timber, Tr. 442, 592, 606, 616; fish in the streams, Tr. 442, 448, 598; drink from them, Tr. 484-85; swim in them, Tr. 480; and pass the land down to their children and grandchildren in a pristine state. Tr. 329, 442, 454, 465, 482, 502, 554.[3] Thus, Combustion is incorrect in insisting that there is no evidence of "diminution in property value, damage to crops or animals, or other economic loss." Pet. 7. In any event, this Court in *Gore* explained that the non-economic dimension of an injury gives greater (not less) validity to a punitive award, because "the monetary value of noneconomic harm might have been difficult to determine." 517 U.S. at 582.

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[3] Combustion suggests that any harms were the result of the mining operations that had ceased in 1986 and hence fell outside the statute of limitations. That is false. The evidence at trial showed that Combustion's pollution persisted from 1987 to the time of trial. See pp. 4-9, *supra*. Moreover, under Georgia law, liability for tortious acts that cause continuing pollution within four years of the filing of the suit is not barred by the statute of limitations even though the acts causing the continuing trespass occurred more than four years before suit. *Hoffman v. Atlanta Gas Light Co.*, 426 S.E.2d 387, 389-90 (Ga. App. 1992), *cert. denied*, 1993 Ga. LEXIS 336 (Ga. Apr. 8, 1993).

Further, Combustion misstates the relevance of the statute of limitations. Throughout its two decades of mining on Graves Mountain, Combustion knew that, absent concerted efforts at reclamation (i.e., long-term restoration) and remediation (i.e., immediate pollution treatment), its operations would inevitably produce huge quantities of toxic pollutants that would flow into plaintiffs' streams. Evidence of Combustion's pre-1987 knowledge was at minimum admissible under Fed. R. Evid. 404(b) to establish state of mind and to show that Combustion has long been on notice of the need for effective action. *See, e.g., Big Apple BMW, Inc. v. BMW of North Am., Inc.*, 974 F.2d 1358, 1361 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993); *see also TXO*, 509 U.S. at 450 n.10, 457, 461 (plurality opinion) (relying on evidence of fraud and other misconduct not part of plaintiff's slander of title claim).

3. More generally, the appropriate ratio between punitive and compensatory damages in a particular case is not a legal talisman, but an inherently fact-bound issue which is not suitable for this Court's review. In *Gore*, this Court held that the ratio between punitive damages and "the actual harm inflicted on the plaintiff" was one factor for a reviewing court to consider. *Id.* at 580. But the Court made clear that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Id.* at 582 (emphasis in original); *see also TXO*, 509 U.S. at 459-62 (1993) (upholding 526-to-1 ratio between punitive and compensatory damages); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (200-to-1 ratio between punitive damages and out-of-pocket expenses); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (ratio of punitive to compensatory damages over 100-to-1). In fact, *Gore* explained that a high ratio between punitive and compensatory damages may be appropriate in some cases:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, *a particularly egregious act has resulted in only a small amount of economic damages*. A higher ratio may also be justified in cases in which the injury is hard to detect or the *monetary value* of noneconomic harm might have been *difficult to determine*.

517 U.S. at 582 (emphasis added). In the wake of *Gore*, some courts have permitted high ratios between punitive damages and compensable harm,[4] while others have not, *see, e.g.*, Pet. 13-15,

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[4] *See, e.g., Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164-65 (Wis. 1997) (100,000-to-1); *Lee v. Edwards*, 101 F.3d 805, 810-13 (2d Cir. 1996) (75,000-to-1); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 260-61 (Ga. App. 1996) (45,000-to-1); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996), *cert. denied*, 118 S. Ct. 52 (1997) (500-to-1); *United States*

depending on the particular facts of individual cases. In upholding a punitive damage award with a 12-to-1 ratio, for example, Chief Judge Posner explained that "a mechanical ratio, such as two to one or three to one or four to one or even ten to one, would not make good sense." *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996). "The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." *Id.*[5]

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v. Big D. Enterprises, Inc., 1999 U.S. App. LEXIS 15121, *15-*17 (8th Cir. July 9, 1999) (100-to-1); *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645, 1652, 1658-68 (1996), *review denied*, 1997 Cal. LEXIS 61 (Cal. Jan. 15, 1997) (78-to-1); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 817 (S.D. 1996) (30-to-1); *Elder v. Gaffney Ledger, Inc.*, 511 S.E.2d 383, 390 (S.C. App. 1999) (30-to-1); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Ida. 1996) (26-to-1); *Coleman v. Kaye*, 87 F.3d 1491, 1506 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 754 (1997) (23-to-1).

Combustion discounts some of these cases that have upheld high ratios as involving "nominal or very low damages," *see* Pet. 20 n.5, but does not explain why this is a distinction with a difference. Combustion asks this Court to set out numerical ratio guidelines to govern when compensatory damages "are more than nominal," Pet. i, and it offers ratios that it believes should control where compensatory damages fall "between $10,000 and $50,000," as in this case. Pet. 13. Combustion offers no justification for such categories, which lend themselves more to the practice of numerology than the practice of law.

[5] *See also* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 65 (1990) ("The greater the divergence between the compensatory damages awarded and the actual costs the conduct imposes upon society, the greater the need for an award greatly exceeding the compensatory damages."); Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117, 153-54 n.136 (1989) ("[I]t seems that low compensatory damages would require a greater deterrent in the form of punitive damages than necessary when compensatory damages are high. . . . [I]f A and B engage in equally wrongful conduct, but A causes $100,000 in harm and B $1,000,000, by what logic is it held that B, having paid ten times as much in compensatory damages, now should be held liable for greater punitive damages than A?").

4. The award in this case is necessary to achieve deterrence by removing Combustion's wrongful gain. A punitive damage award in this case on the order of a few times the $10,000 in use-and-enjoyment damages collected by respondents would give a wrongdoer such as Combustion no incentive to institute necessary remediation and reclamation efforts in a timely fashion, knowing that it stands to save $6 million by doing nothing. As in *TXO*, here a high ratio is constitutionally unobjectionable, especially when the punitive award is compared with the economic gain from the wrongdoing. In this case, the ratio between respondents' $1 million punitive award and Combustion's $6 million actual gain from its intentional, bad-faith trespass is only 1-to-6 (that is, only a small fraction of actual gain) — sixty times lower than the 10-to-1 ratio that this Court in *TXO* suggested would be reasonable. 509 U.S. at 459-62. No case or legal principle cited by Combustion remotely establishes that a punitive damage award of a *fraction* of an intentional wrongdoer's illicit gain should be considered grossly excessive under the Fifth Amendment.

II. IN ANY EVENT, THE $1 MILLION PUNITIVE AWARD IN THIS CASE IS PLAINLY REASONABLE, RENDERING THE "RATIO" ISSUE IRRELEVANT

Even if the question framed by Combustion were actually presented, this Court's review would be unwarranted because a $1 million punitive award in this case is plainly reasonable. The court of appeals held that the punitive award was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." Pet. App. 27a. The Eleventh Circuit was correct: Combustion retained an illicit gain of $6 million in this case, and a substantial punitive award was justified. The award is also reasonable in light of legislatively authorized penalties in Georgia, which put Combustion on notice of its potential liability, and in light of Combustion's size and financial position.

Thus, the court of appeals' judgment would not change even if Combustion's argument about ratios between punitive and compensatory damages had any merit. Review should be denied because the "ratio" argument, which is the basis of Combustion's question presented, would not affect the proper constitutional analysis in this case.

A. The Award is Reasonable by Reference to Combustion's Actual Gain

An expert witness called by plaintiffs, whose qualifications and methodology for reaching his opinion were unchallenged, testified that Combustion was able to save $6 million between August 1987 and the 1993 trial by failing to adopt proper measures to correct the problems with acid mine drainage entering plaintiffs' property. Tr. 1216-17. This figure does not include pre-1987 profits, such as the gain to Combustion from failing to reclaim while mining operations were ongoing, which in itself was contrary to standard industry practice. Tr. 941, 1217. Combustion had ample opportunity to respond to this testimony but did not rebut it.

Plainly, the imposition of a $1 million punitive award to redress an illicit gain of $6 million is hardly irrational. If anything, the award should have been greater. Under Georgia law, plaintiffs are lower riparian owners who have the absolute right "to have water flow upon [their] land in its natural state free from adulteration," *Kingsley Mill Corp. v. Edmonds*, 67 S.E.2d 111, 112 (Ga. 1951), regardless of whether mining is more profitable than other uses of the land. *See Satterfield v. Rowan*, 9 S.E. 677, 679 (Ga. 1889) ("[Plaintiff] was entitled to have the water flow upon his land from [defendant mining company's] land in its natural state . . . whether the stream of water was more useful for the purpose of mining than it was for domestic purposes").[6]

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[6] *See also* O.C.G.A. § 51-9-7 ("The diverting of the stream in whole or in part from its natural and usual flow, or the obstructing thereof . . ., or the

The Georgia courts have repeatedly held that the failure properly to remediate pollution constitutes a trespass, subjecting the trespasser to punitive damages, and that a defendant cannot immunize itself merely by showing that it made *some* half-hearted efforts at remediation.[7] The jury found at trial that Combustion trespassed on plaintiffs' riparian rights with full knowledge that it was doing so, with "specific intent" to continue trespassing, and in "bad faith." These findings remain the law of the case.

Accordingly, this Court's decision in *BMW v. Gore* fully *supports*, rather than undermines, the punitive damage award here. *Gore* specifically upheld the power of a State to impose punitive damages "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" in order to "protect[] its own consumers and its own economy." 517 U.S. at 568, 572. In *TXO*, which was reaffirmed in *Gore*, a plurality noted, "in addition to TXO's vast wealth, the tremendous financial gains that TXO hoped to achieve" and "the lucrative stream of royalties" that TXO hoped to win. 509 U.S. at 461-62. This Court indicated that

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polluting thereof so as to lessen its value to the owner of such land shall constitute a trespass upon the property"); *Brooks v. Ready Mix Concrete Co.*, 96 S.E.2d 213, 214-16 (Ga. App. 1956) (citing *Gainesville, J. & S. R. Co. v. Edmondson*, 29 S.E. 213 (Ga. 1897)) (reaffirming ancient and absolute right against trespass caused by defendant's use of its real property as distinguished from, for example, a railroad's negligent discharge of sparks incident to its operation of a train along a right of way).

[7] *See Ponce de Leon Condominiums v. DiGirolamo*, 232 S.E.2d 62, 64 (Ga. 1977) (punitive damages warranted even though defendant relied on expert advice that its activities would cause no water run-off problem, and subsequently "made some effort to alleviate" the effects of problem); *Hudgins & Co. v. J&M Tank Lines, Inc.*, 450 S.E.2d 221, 222 n.1 (Ga. App. 1994), *cert. denied*, 1995 Ga. LEXIS 461 (Ga. Feb. 23, 1995) (a knowing failure to effectively remediate pollution, even if defendant "did take some actions to remediate," is willful misconduct that warrants punitive damages); *Hoffman v. Atlanta Gas Light Co.*, 426 S.E.2d 387, 389-91 (Ga. App. 1992), *cert. denied*, 1993 Ga. LEXIS 336 (Ga. Apr. 8, 1993) (knowing failure to clean up hydrocarbon spillage from pipeline constitutes continuing trespass, even after the leaks have been fixed, permitting award of punitive damages).

an award of even ten times the size of TXO's expected gain would be reasonable. In *Haslip*, which was also reaffirmed in *Gore*, the Court approved consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss" as a factor in judging the reasonableness of an award. 499 U.S. at 22.

Combustion's real quarrel is with substantive Georgia law. It contended below that it should not be punished in any substantial amount for polluting plaintiffs' land, because the cost of cleaning up its streams containing acid mine drainage before they reach plaintiffs' land was supposedly greater than the diminution in the alleged market value of plaintiffs' land. This argument is triply flawed.

1. Combustion's argument is inconsistent with the jury instructions in this case. The jury was instructed as follows:

> In considering whether you will award punitive damages and in what amount: Such award is not meant to be compensation, but should be fixed in *an amount necessary to deter future acts of a similar nature*. It is an amount, as measured by the enlightened conscience of an impartial jury, which will be required to deter future wrongful acts.

Tr. 1195 (emphasis added). The jury was not instructed that punitive damages should be limited by the value of plaintiffs' land or any similar factor. Instead, consistent with the jury instructions focusing on deterrence of future wrongful acts, the jury was urged in closing argument — without objection — to "take the profit out of polluting" and to render a verdict that would "restore the dignity of property rights." Tr. 1240-41.

Whether the punitive award is excessive must be measured by applying the jury instructions to the factual record, which are now law of the case, not by asking whether the facts would support the award under some alternative version of the law. *See, e.g., Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675

(7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *see also Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 4 & n.3, 5 (1st Cir. 1992); *Bogan v. Stroud*, 958 F.2d 180, 183-84 (7th Cir. 1992); *Sims v. Mulcahy*, 902 F.2d 524, 535-36 (7th Cir.), *cert. denied*, 498 U.S. 897 (1990).

2. Combustion's argument is simply off limits to a federal court under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Combustion contends that, whatever substantive Georgia law has to say on this subject, the federal Constitution somehow commands that a State can never impose a penalty on a polluter who trespasses on the property owned by another, if that penalty is linked not to *the fair market value of the land* (a "pollute and pay" system), but is instead designed to deter the polluter from causing the harm in the first place, by setting the penalty in reference to the level of *the financial benefit the polluter receives* from refusing to implement the necessary cleanup measures. Combustion's argument is nothing short of *Lochner*ism. Georgia is no more required to adopt Combustion's view of economics than it is required to adopt "Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Further, "pollute and pay" is inconsistent with the traditional approach to property rights in this country. "[O]therwise, a person so disposed might forcibly dispossess another of any article of property at his pleasure, and compel the owner, however unwilling, to accept of the value in its stead." *Edwards v. Beach*, 3 Day 447, 450 (Conn. 1809). Indeed, giving polluters like Combustion what is, in effect, a judicially enforceable power of private eminent domain would raise serious constitutional questions under the "public use" requirement of the Takings Clause. *E.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77-80 (1937) (Brandeis, J.).

3. Third, Combustion's argument is also profoundly flawed as a matter of elementary legal principle because it confuses *property* rules with *liability* rules. Some rights and assets, such as the entitlement to be free from breaches of contract or negligently

caused accidents, are protected only by liability rules. A defendant who violates such an entitlement need pay only ordinary compensatory damages. But the distinguishing characteristic of a "property right," such as the right under Georgia law to unpolluted water, see pp. 23-24 & n.6, *supra*, is that "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972); *see also Symposium: Property Rules, Liability Rules, and Inalienability: A Twenty-Five-Year Retrospective*, 106 YALE L.J. 2081 (1997).

Even if social welfare would be increased if the property right in question — here, the right to control the level of pollution in plaintiffs' streams on Graves Mountain — were in the hands of Combustion rather than plaintiffs, that would be no reason to allow Combustion unilaterally to decide to pollute and pay merely compensatory damages. This property right, initially vested in plaintiffs under well-settled Georgia law, can easily be transferred to Combustion through legitimate avenues of market exchange. Indeed, Combustion's settlements with respect to 12 of the 13 judgments effectuated this very type of property transfer.

If Combustion had bargained with plaintiffs, the purchase price would have been determined by the value of the property to plaintiffs (which was not in evidence before the jury)[8] and the

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[8] Combustion asserted below that the estimated aggregate fair market value of plaintiffs' land (which of course might be less than the value of the land to plaintiffs personally) was $1.347 million. But this figure was never introduced into evidence at trial. Indeed, on Combustion's own motion, all evidence of the land's value was barred as irrelevant to the case. Tr. 622:10-623:7, 631:18-632:14, 659:21-660:9. Combustion explicitly waived any argument that might depend on the value of plaintiffs' land. Tr. 17, 622-23, 629-32; R-3-63 at 13-17. A federal court "cannot, consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991); *see also Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 280 n.26 (1989).

value of the property to Combustion (at least $6 million). Permitting Combustion to escape such a bargaining process by authorizing it to trespass at the price of paying only compensatory damages would improperly allow it to retain all the gains from exchange that would have been divided between the parties had they freely bargained over the sale of the property.[9]

B. The Award is Reasonable By Reference to Legislatively Approved Penalties

In *Gore*, this Court made clear that "[c]omparing the punitive damage award and the civil or criminal penalties that *could* be imposed for comparable misconduct" provides another test for judging excessiveness. 517 U.S. at 583 (emphasis added). This factor demonstrates the reasonableness of the award in this case.

First, this Court in *Gore* considered the size of awards "that would be permissible under [state tort-reform] statutes." *Id.* at 582 n.36. Here, it is notable that this case was tried under a Georgia statute capping punitive damages at $250,000 except where a plaintiff can prove specific intent to cause harm. O.C.G.A. § 51-12-5.1(f). Thus, the Georgia legislature has decided *not* to impose a limit on punitive damages in cases like this one. It has singled out such cases as ones in which severe punishment is warranted.

In addition, this action was brought by 23 separate plaintiffs owning 16 different plots of land. Even if each plaintiff had received no more than the $250,000 allowed by the Georgia

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[9] It bears emphasis that even if the property right in question could not easily be transferred, there is no obvious basis for questioning the policy judgment under Georgia law that mining companies such as Combustion still may not pollute the streams in question, even if such pollution could increase societal wealth. *See, e.g.*, Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669-70 & n.62 (1998) (observing that to rely on principles of economics to justify a societal goal of wealth maximization is a "doomed effort"). *See also* Ronald Dworkin, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237, 242-44 (1985); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1752 & n.5 (1998).

legislature in cases *not* involving specific intent to harm, the total punitive damage award in this case permitted under Georgia law would have been $5.75 million. In this case, of course, the jury found that Combustion acted with specific intent to cause harm, a finding that was upheld in the earlier appeal. Hence, the Georgia legislative scheme provides additional support for the award.

Also relevant in assessing the reasonableness of the instant award is the Georgia Water Control Act, which Combustion violated. Tr. 984-86. Under this Georgia statute, civil penalties of up to $100,000 per violation per day may be assessed for repeated violations. O.C.G.A. § 12-5-52(a). In addition, the Act carries criminal penalties; knowing violations are punishable as felonies. O.C.G.A. § 12-5-53(a) & (c). The district court acknowledged that, if the maximum legislatively authorized penalty had been imposed on Combustion, it would have faced a $146 million fine. R8-266-10. *Gore* instructs a focus on the "maximum civil penalt[ies]" "that *could* be imposed," 517 U.S. at 583-84 (emphasis added), not on the patterns of administrative enforcement.

C. The Award is Reasonable by Reference to Combustion's Size and Financial Position

The punitive award is also eminently reasonable in light of Combustion's 1990 purchase price of $1.6 billion. Tr. 1199. The district court previously explained that this was "one of the most apposite cases" for considering the defendant's financial position, since an award of "one million dollars" would be "a mere inconvenience" — "as much corporate blood as a mosquito would draw." 4/25/94 Tr. 109.

This Court has repeatedly noted the "well-settled law" that the size of a punitive damage award may be justified as constitutionally reasonable by reference to a defendant's wealth. *TXO*, 509 U.S. at 462 n.28 (plurality opinion). Justice Breyer, joined by Justices O'Connor and Souter, explained in *Gore* that "one can understand the relevance of this factor to the State's interest in retribution." *Gore*, 517 U.S. at 591 (concurring opinion); *see also*

Haslip, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (evidence of wealth "is traditionally admissible as a measure of the amount of punitive damages that should be awarded"); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641-42 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997) (concluding that wealth remains relevant under *Gore*); RESTATEMENT (SECOND) OF TORTS § 908(2) & comment e (1979); Annotation, *Punitive Damages: Relationship to Defendant's Wealth, As Factor in Determining Propriety of Award*, 87 A.L.R.4TH 141, 151 (1995) (noting that the "vast majority of courts" permit wealth to be considered).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-252

In the Supreme Court of the United States

COMBUSTION ENGINEERING, INC., *Petitioner*

v.

LOIS A. MCGILL, SAMUEL CLARY MCGILL, KATHERINE MCGILL LAMAR, JENIDA S. MCGILL, INEZ M. MCWHORTER, KATHLEEN MCGILL BEGGS, CHERRY MCGILL ROWLAND, EUGENE H. MCGILL, JR., JAMES CURTIS MCGILL, ELIZABETH BEVEL MCGILL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The petition for certiorari sets forth the reasons why this case is an ideal vehicle for refining the due process analysis applicable to claims of excessive punitive damages. The case involves conduct that was found by both lower courts not to be reprehensible, yet the decision below upholds a punishment that stands at 100 times the compensatory damages and bears a comparably extreme relationship to the civil penalty considered by the expert agency to be an adequate and appropriate response to the precise conduct at issue. It thus squarely presents the recurring question of the circumstances under which a large ratio of punitive to compensatory damages is permissible and, relatedly, the range of ratios that is allowable when such circumstances are not present.

Respondents do not deny that the lower courts have expressed and generally manifested confusion regarding the application of the *BMW* factors and that the decision below (and several decisions of state high courts) cannot be reconciled with decisions of other federal courts rejecting ratios of the magnitude involved here. Instead, respondents attempt to distract the Court from the growing conflict over the reasonable relationship guidepost by presenting a view of the facts that was rejected by both courts below (for good reason), by claiming that the ratio here isn't really 100:1 (which would certainly surprise both lower courts), and by focusing on a justification for the ratio that was not invoked by either of the lower courts.

Yet when all of the smoke generated by respondents is cleared away, the fact remains that the Eleventh Circuit upheld a $4.35 million punishment that was 100 times the compensatory damages, even though it agreed with the district court that the conduct was not reprehensible. Given the rationale invoked by the Eleventh Circuit — that Georgia has a strong interest in deterring environmental torts (which, for some unarticulated reason, is not deemed satisfied by the civil penalty imposed by its own expert environmental regulatory agency) — the decision below, if left undisturbed, threatens to eviscerate *BMW* by effectively espousing the principle that virtually any

ratio is acceptable in furtherance of a state's general interest in deterring torts. The Court's intervention is needed to prevent the erosion of *BMW* and would be immensely valuable by providing needed guidance as to the proper application of the reasonable relationship guidepost.

1. Respondents devote almost ten pages of their opposition to an inaccurate, one-sided presentation of the facts. They attempted to sell a similar version of the facts to the courts below, but the district court, after overseeing the trial, reviewing the record, and reading the briefs, flatly rejected respondents' factual assertions. It instead expressly concluded that "Combustion had actively attempted to prevent acidic water from entering the streams emanating from its property," that "Combustion's most egregious conduct was the failure to do more to prevent the acidic water problem," that "Combustion did not act with intentional malice," that "[t]he evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of any kind after it reacquired the property" — in short, that "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe." Pet. App. 34a, 35a, 38a. After reviewing the record for itself, the court of appeals concluded that the district court's "finding that CE's conduct was not highly reprehensible is not clearly erroneous." *Id.* at 22a.

In suggesting that the record reflects that CE engaged in egregious misconduct, respondents are thus continuing to fight a battle they have long since lost. There therefore is no need for us to respond to the many mischaracterizations of the record contained in their brief.[1] The case comes to the Court as one

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[1] If the Court nevertheless desires to confirm for itself that respondents' presentation of the facts is unreliable, the reply brief we filed the first time this case was before the Court (No. 95-1072), demonstrates the inaccuracy of several of the same factual assertions that respondents make here.

(continued...)

involving low reprehensibility. It thus cleanly presents the issue of whether and when a large ratio is justifiable in a low reprehensibility case.

2. Respondents assert (Opp. 15-17) that this case is not a good vehicle for addressing the reasonable relationship issue because CE has settled with several of the original plaintiffs, leaving "only" one $1 million punitive judgment remaining.

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[1] (...continued)

There is, however, one misrepresentation about the subsequent history of the case that we cannot allow to go unanswered. Respondents assert (Opp. 2) that the district court and court of appeals each twice determined that CE acted with a specific intent to cause harm. In fact, the district court did not expressly address the "specific intent" issue when it acted on the original post-trial motions. Rather, it first mentioned the point on remand, expressly stating at that time that "there is no direct evidence of specific intent to cause harm in the record of this case" and hypothesizing that the jury "must have inferred specific intent from a finding of deliberate indifference to the consequence of [CE's] actions." Pet. App. 35a. The court did not purport to agree with the jury (since the issue of the applicability of the Georgia cap was no longer before it). Indeed, its finding that CE "actively attempted to prevent acidic water from entering the streams" and its conclusion that "it is ***absolutely clear*** * * * that the degree of reprehensibility in this case is not very severe" (*id.* at 34a, 38a (emphasis added)) strongly suggest that the court did not agree that there was a specific intent to cause harm.

There is likewise no basis for saying that the court of appeals twice found an intent to injure. When the case first came to the court of appeals, respondents asserted that CE had failed to preserve the cap issue by not moving for JMOL at the close of all the evidence. Because the Eleventh Circuit affirmed without opinion, there is no way to know whether it reached the merits of CE's cap argument. The second time the case was before the Eleventh Circuit, the only issue was constitutional excessiveness. The court thus had no occasion to consider whether the evidence supported a finding of intent to cause harm.

But the settlements change nothing of relevance. The fact remains that the punitive damages are 100 times the compensatory damages and 100 (instead of 435) times the fine actually imposed by the EPD. Those ratios present the issue every bit as starkly as if the settlements hadn't taken place.

3. Respondents claim (Opp. 17) that, because they perceived state law to require them to forgo a claim for diminution in market value in order to pursue an injunction, their compensatory award understates their injury and that this case therefore is not really a good candidate for refining the reasonable relationship guidepost. To begin with, the question of the extent to which uncompensated harm should be considered in the analysis would, if anything, make this case a better vehicle for addressing the complications that arise in applying the reasonable relationship guidepost. But, in fact, no such complicating factor is involved here. There is no evidence in the record that respondents suffered any diminution in the value of their property. Although respondents blame CE for that, no evidence is no evidence, whatever the reason, and the remedy for the erroneous exclusion of evidence is a new trial, not a resort to speculation.

In any event, respondents are simply wrong in blaming CE for their failure to introduce evidence of diminution in market value. To be sure, CE contended at trial that such evidence was irrelevant to the plaintiffs' chosen measure of *compensatory* damages. That was the only purpose for which the plaintiffs proffered this evidence. They never suggested to the district court that they believed this evidence to be relevant to the determination of punitive damages, an argument that would have supported its admission only in the *second phase* of this bifurcated trial. Fault for that omission was theirs alone.[2]

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[2] It bears noting that, if accepted, respondents' argument would allow them the benefit of an unproven assumption that their property

(continued...)

Finally, we note that the plaintiffs made this point to both lower courts, neither of which found it sufficiently persuasive to use as a justification for the 100:1 ratio that each explicitly endorsed.

4. Respondents also contend (Opp. 18) that the value of their claim for injunctive relief should be included in the denominator of the ratio. This argument also was made and implicitly rejected below — for good reason. The fact that respondents have the Damoclean sword of an injunction hanging over CE's head means that there is less need for a high punitive award, not more. In any event, here again, to the extent the possibility of an injunction is relevant one way or the other, it makes the case a more, not less, attractive candidate for certiorari.

5. Respondents next assert (*ibid.*) that the attorneys' fees and costs that the plaintiffs were *jointly* awarded should be included in the denominator of their ratio.[3] This argument was made to and implicitly rejected by both courts below. This rejection may have been based simply on a factual finding that plaintiffs' harms did not include litigation costs: CE had argued against inclusion of the fees and costs in the denominator on the ground (among others) that there was no evidence that the plaintiffs (as opposed to their contingent fee lawyers) had incurred the fees or advanced the costs and hence that these fees

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[2] (...continued)
did in fact suffer a permanent loss of value. Given that the streams make up only a tiny percentage of the acreage owned by respondents and that their predecessor in interest testified that the harm to their stream occurred *during mining* — *i.e.*, outside the limitations period — (Tr. 607-608), respondents' unsubstantiated assumption is in fact highly implausible.

[3] Respondents' apportioned share of the fee award is less than $17,500.

and costs had not been shown to be part of plaintiffs' injury.[4] But even if the argument was rejected as a matter of law and therefore remains open, the presence of a question whether to add litigation costs to the numerator, the denominator, or neither simply makes this case a more useful vehicle for providing guidance on the reasonable relationship guidepost. See generally *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").[5]

6. Having rehashed all of their old arguments about additional amounts that should be added to the denominator, respondents then make the new argument that the ratio is "meaningless" because "the use-and-enjoyment damages sustained by plaintiffs were difficult to quantify." Opp. 18. They insist (*id.* at 18-19) that the jury undervalued the loss and that "[t]he evidence showed that the injury sustained by plaintiffs was severe." Needless to say, neither the jury nor the district court nor the court of appeals agreed with their assessment of the evidence. See, *e.g.*, Pet. App. 2a & n.2. Moreover, at the risk of sounding like a broken record, the fact

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[4] The absence of evidence that respondents incurred any out-of-pocket expenses distinguishes this case from *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In that case, the attorneys' fees were actually incurred by the respondents in *defending* the "frivolous declaratory judgment action" (*id.* at 449 (citation omitted)) that had been brought against them as part of the petitioner's bad-faith scheme to wrest away their royalty rights and were awarded as *compensatory* damages for the tort alleged by the respondents.

[5] Respondents never complained to CE during the reclamation process about the runoff into their streams, but instead simply brought suit. Tr. 607-608. (Nor did any of the other plaintiffs. See Tr. 424, 431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 654, 964, 989.) It would be ironic if such behavior, which very possibly generated needless litigation, were regarded as justification for a disproportionate punitive/compensatory ratio.

that this case assertedly involves one of the exceptions to the low-ratio presumption identified in *BMW* makes it more, not less, worthy of review.

7. Respondents next assert (Opp. 20) that the determination of a constitutionally permissible ratio is "an inherently fact-bound issue which is not suitable for this Court's review." If this were a sufficient reason for denying certiorari, however, *BMW* itself should not have been reviewed. Nor, to take another of many possible examples, should the Court have granted review in the numerous search and seizure cases that have fleshed out for the lower courts such concepts as probable cause, consent, and exigent circumstances. Likewise, the Court has decided many "fact-bound" cases regarding the application of the four-part *Central Hudson* test for determining the allowable limits of government regulation of commercial speech. It is, indeed, almost a truism that one of the important ways in which this Court provides guidance to lower courts is by developing and applying legal principles in specific fact contexts. So, here, facts like those that frame the excessiveness issue in this case have given rise to competing rules of decision, and it is the essence of this Court's proper role to determine which of those competing, inconsistent decisional principles is correct.

8. Respondents argue at considerable length (Opp. 22-28) that the punitive damages are reasonable when compared to the amount CE allegedly saved by failing to adopt the various measures recommended by their expert at trial. They made this argument to this Court in their unsuccessful effort to defeat certiorari the first time this case was here. They made the argument again in the trial court as a basis for upholding the entirety of the then-$12 million punitive award, and the trial court implicitly rejected it. And they made it still again in the court of appeals in support of their argument that the $12 million punishment should be reinstated; it again received no judicial endorsement, even as a basis for approving a punitive award that is 100 times the compensatory damages. Thus, this

ground cannot be used as a basis for reconciling the Eleventh Circuit's ruling with the many cases rejecting high ratios.

Of course, were the Court to hear the case on the merits, respondents could trot out this argument again in an effort to justify the award.[6] But as with their other points, this wrinkle serves only to make this case an attractive vehicle for providing guidance on the reasonable relationship issue.

9. Respondents also assert (Opp. 28-29) that the punitive damages are reasonable when compared to the Georgia cap statute and the theoretical maximum penalty available under state law for environmental infractions. As for the former, it is hard to understand how a $250,000 cap provision that can be lifted upon a finding of a specific intent to cause harm can be said to give fair notice of a $1 million penalty any more than the general, cap-less common law of Alabama gave notice of a $2 million punishment in *BMW*. Plainly, that was not what the Court had in mind when it identified penalties for similar conduct as a guidepost.

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[6] In the lower courts, we laid out the numerous legal, factual and logical reasons why respondents' "avoided cost" argument is wrong. See, *e.g.*, Brief for the Appellant at 30-33 and Brief of Cross-Appellee and Reply Brief of Appellant at 34-38, *Combustion Engineering, Inc. v. Johansen*, 170 F.3d 1320 (11th Cir. 1999) (No. 97-8726). For present purposes, it suffices to point out that, even if it were constitutionally permissible (and we by no means concede that it is) to base a punitive award on avoided costs — without regard to the degree of reprehensibility of the conduct, the disproportionality of the punishment to any injury threatened or actually sustained, or the divergence of the punitive damages from the relevant civil penalty for the conduct at issue — the proper measure of avoided costs in this case would be the market value of a drainage easement, not the price tag of remediation techniques proposed for the first time at trial by the plaintiffs' expert (which, we note, far exceeds the market value of the entirety of all of the plaintiffs' properties). The plaintiffs adduced no evidence of this more appropriate measure of avoided costs.

As for the argument based on the statutory civil penalties, both the district court and the court of appeals expressly rejected the contention that the theoretical maximum supplies the appropriate figure for the third *BMW* guidepost. Pet. App. 23a-24a, 38a-39a. Respondents' disagreement with that interpretation of *BMW* serves to make this case more worthy of review, not less.

10. Finally, respondents contend (Opp. 29-30) that CE's wealth justifies the 100:1 ratio in this case. As indicated in the petition, however, the role of wealth in the excessiveness analysis is an issue that has confused and divided the lower courts. Respondents' reliance on wealth thus supplies an additional reason for granting certiorari, not denying it.

In sum, the significance to the excessiveness analysis of the kinds of factors identified by the courts below and advanced by respondents here is a source of recurrent and continuing disagreement and confusion. While no single case can bring total clarity to all aspects of the endeavor, it is hard to think of a better candidate than this case for taking a long stride down the road to more coherent and consistent administration of this very important aspect of constitutional law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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